Supreme Court, U.S.
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No. 04-

IN THE
Supreme Court of the United States

JEFFREY BUBNA,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents,

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Holding that First Amendment rights should not generally be "deemed more compelling than laws barring marital status discrimination," the Alaska Supreme Court ruled that local housing discrimination laws require Jeffrey Bubna, a devoted member of the Christian faith and a residential landlord, rent property to unmarried cohabitors in disregard of his sincere religious conviction that cohabitation and the facilitation of cohabitation are sinful. The questions presented are:

1. Are housing discrimination laws that contain categorical exceptions permitting wholesale marital status discrimination – and in some circumstances permitting discrimination on the bigoted basis of race, color, national origin, religion and sex – subject to strict scrutiny under the Free Exercise Clause for a lack of general applicability or neutrality because they singularly forbid religious landlords from declining rental to unmarried cohabitors on a case-by-case basis consistent with religious conviction?

2. Are the housing discrimination laws subject to strict scrutiny because they burden "hybrid rights," namely free exercise of religion "in conjunction with" "other constitutional protections" of free speech, property ownership, and occupational liberty?

3. Does eliminating marital status discrimination constitute a compelling government interest, specifically in circumstances where government allows marital status and other bigoted forms of housing discrimination in immense circumstances?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Appellants (Petitioner herein): Jeffrey Bubna, Kevin Thomas, and Joyce Baker.[1]

Appellees (Respondents herein): Anchorage Equal Rights Commission, the Municipality of Anchorage, and Paula Haley in her official capacity as the Executive Director of the Alaska State Commission for Human Rights.

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[1]Kevin Thomas and Joyce Baker, who were parties in the action below and who previously were plaintiffs in *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc) *cert. denied* 531 U.S. 1143 (2001); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir.) *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), have decided to allow Mr. Bubna to proceed alone in this Petition. Mr. Bubna was neither a party nor a privy to the prior federal litigation and he is, therefore, not bound by its final judgment on the issue of justiciability

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Petitioner Jeffrey Bubna respectfully petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court in this case.

OPINIONS BELOW

The Alaska Supreme Court's opinion is reported at 102 P.3d 937 (Alaska 2004). (Appendix A (App. 1a)) The order of the Superior Court of the State of Alaska is unreported. (Appendix B (App. 22a)). The Alaska Supreme Court's opinion in *Swanner v. Anchorage Equal Rights Comm'n*, which was reaffirmed in this case, is reported at 874 P.2d 274 (Alaska 1994) *cert. denied* 513 U.S. 979 (1994) (Thomas, J., dissenting). (Appendix C (App. 32a))

JURISDICTION

The Alaska Supreme Court issued its decision on December 10, 2004. (App. 1a) This Court has jurisdiction to issue a writ of certiorari to the Alaska Supreme Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant constitutional provisions, statutes and ordinances are set out in Appendix D and Appendix E (App. 69a-73a).

STATEMENT OF THE CASE

1. ***Introduction.*** This petition challenges the Alaska Supreme Court's subordination of the Free Exercise Clause of the First Amendment to local government interests to deter marital status discrimination in housing in circumstances in which Alaska and Anchorage generally do not prohibit marital status and other forms of discrimination in housing. The First Amendment claims in this action raise important questions of constitutional law by calling for a definitive application of the general applicability, neutrality, and hybrid doctrines of *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

Departing from the course marked by the United States Courts of Appeal for the Third and Eleventh Circuits and also the Washington Supreme Court, the Alaska Court found that the housing discrimination laws are generally applicable[1] despite the fact that they contain categorical exceptions that tolerate the so-called "independent social evil" of housing "discrimination"[2] in huge circumstances. The laws contain exceptions that permit a landlord to maintain either "singles only" or "married couples only" housing and thus in the latter case permit the landlord to turn away unmarried people, including cohabitors, with impunity. The laws also permit a

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[1]According to *Smith* and *Lukumi*, laws that burden religious freedom and that are not generally applicable are subject to strict scrutiny. *Smith*, 494 U.S. at 881-82; *Lukumi*, 508 U.S. at 531-32; *accord City of Boerne v. Flores*, 521 U.S. 507, 513-14 (1997).

[2]*Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) *cert. denied* 513 U.S. 979 (1994) (Thomas, J., dissenting) (App. 48a).

landlord who shares common-living-area with a tenant to reject potential tenants on the bigoted basis of race, color, national origin, religion and sex.[3] These allowances are large enough to cover all of the plausible secular ground – every conceivable secular reason for discriminating in housing is accommodated. The laws, however, provide no exception for Bubna who based upon his sincerely held religious beliefs simply wants to use one comparatively smaller basis of selection when choosing tenants.

For sincere religious reasons, Bubna wishes to discriminate to a lesser degree than what the categorical exceptions to the laws allow. Bubna simply wants to decline rental to one small fraction of the larger class of "single" tenants – namely, unmarried cohabitors. But, although Bubna desires to engage in less discrimination than the exceptions to the laws otherwise allow the Alaska Court rejected Bubna's plea of religious hardship. The Alaska Court's ruling undermines the government's asserted compelling objectives and at the same time devalues Bubna's religious conviction. The Alaska Court literally informed Bubna that if he will only engage in social segregation and discriminate to a larger degree than his religious conviction requires, and thereby forfeit his ability to rent to a large portion of the rental market (*i.e.*, all singles), then it will tolerate his discriminatory rental practices whether they are religiously motivated or not.

No secular based reason for marital status discrimination in housing is similarly devalued or subjected to similar prohibition or disadvantage. Social segregation of singles and married couples is tolerated completely as are

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[3] *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d at 939 n. 4, 944-45. (App. 3a, 15a-17a); AS 18.80.240 (App. 69a); AMC 5.20.020 (App. 71a); 6 AAC 30.990 (App. 73a).

financial motivations for wholesale exclusion of the entire classes of either singles or married couples. The laws even tolerate racial bigotry as a basis for housing discrimination in some circumstances. The only marital status discrimination in housing that these laws prohibit is that which is committed by a religious landlord who does not believe in discriminating generally, but who instead based on religious conviction formulates his rental policies so as to include all potential tenants save only for unmarried cohabitors whom he rejects on a case-by-case basis. The Alaska Court's general applicability ruling devalues religious conviction in comparison to secular motivations and conflicts directly and in principle with decisions from the Third and Eleventh Circuits, federal district courts, and the Washington Supreme Court.

Departing from the course marked by the United States Courts of Appeal for the Second and Sixth Circuits, the Alaska Court concluded that *Smith* creates a hybrid rights doctrine.[4] Then departing from yet another course marked by the Third, Fourth, Eighth, Ninth, Tenth, and District of Colombia Circuits as well as various state supreme courts, the Alaska Court refused to recognize that Bubna's constitutional claims are "hybrid" in nature in contexts where his religious liberty is burdened "in conjunction with other constitutional protections. . . ." By the decisions of other courts Bubna would have presented a colorable hybrid constitutional claim as contemplated by *Smith* because the laws at issue burden his

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[4] *Smith* declares that "the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections. . . ." 494 U.S. at 881. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, Boerne, and Lukumi* each repeat this rule. *See Watchtower*, 536 U.S. 150, 159 n. 8 (2002); *Boerne*, 521 U.S. at 513-14; *Lukumi*, 508 U.S. at 566-67.

right to free exercise of religion in conjunction with his rights to real property ownership and free speech. *See Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 703-12 (9th Cir. 1999).[5] The laws prohibit Bubna from managing his real property consistent with his religious beliefs. The laws devalue Bubna's religious convictions and single him out for unique legal prohibition if he acts solely on his religious beliefs. The laws prohibit Bubna from engaging in religiously motivated speech whether in the context of his advertising or his interaction with tenants. The Alaska Court's hybrid rights ruling conflicts directly and in principle with decisions from multiple federal circuit courts and also other state supreme courts.

Misinterpreting *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), ignoring *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and reaffirming its decision in *Swanner*, 874 P.2d 274, the Alaska Court ruled that a general interest in eliminating discrimination based upon "irrelevant characteristics" is compelling so as to justify overriding Bubna's free exercise of religion. *Thomas*, 102 P.3d at 940; *Swanner*, 874 P.2d at 282-84 (App. 5a, 46a-52a). According to the Alaska Court, First Amendment rights are not generally "deemed more compelling than laws barring marital status discrimination." *Thomas*, 102 P.3d at 946 (App. 19a). In *Dale*, this Court held that a general interest in eliminating discrimination was insufficient to override the fundamental First Amendment rights at issue in that case (association and speech). 530 U.S. at 647, 660 . In *Yoder*, this Court held that compelling government interests must be narrowly defined. 406 U.S. at 221. Nonetheless, the Alaska Court concluded that a broadly defined general interest

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[5] *Opinion withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), *en banc decision* 220 F.3d 1134 (9th Cir. 2000) *cert. denied* 531 U.S. 1143 (2001).

in eliminating discrimination overrides Bubna's fundamental First Amendment right to free exercise of religion. *Thomas*, 102 P.3d at 946; *Swanner*, 874 P.2d at 282-84 (App. 19a; 46a-52a).

By reaffirming *Swanner*'s notion that all forms of discrimination are constitutionally equivalent and specifically that government has a compelling interest in eliminating housing discrimination against unmarried cohabiting couples, the Alaska Court ignored this Court's decisions in *City of Cleburne v. Cleburne Liv. Ctr*, 473 U.S. 432 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The government interest that the Alaska Court recognized as compelling in *Thomas* and *Swanner* is a general interest in eliminating all forms of discrimination based upon "irrelevant characteristics." 874 P.2d at 282-84 (App. 46a-52a). In *Thomas* the Court focused on eliminating "marital status" discrimination. 102 P.3d at 940 (5a). But, in *Swanner* the Court held that all forms of discrimination are equal "social evil[s]" and that, therefore, government has a compelling interest to eliminate any and all forms of discrimination. 874 P.2d at 282-84 (App. 46a-52a).

Cleburne, however, teaches that different forms of discrimination vary in constitutional significance. 473 U.S. at 440-41. *Bob Jones* and *Roberts* both teach that government interests in eliminating discrimination are compelling and override First Amendment freedoms only when those interests are founded in strong national public policy. 461 U.S. at 592-95, 603-05; 468 U.S. at 625-26. Discrimination against unmarried cohabitors is not equivalent to race discrimination and there is no strong public policy to eliminate it. Moreover, according to *Lukumi* Alaska's and Anchorage's interest in the housing laws cannot be compelling because in analogous contexts, they "leave[] appreciable damage" to their

"supposedly vital interest unprohibited" (508 U.S. at 547), either because they do not pursue their asserted interests at all or because they pursue them to a lesser degree.

2. ***Facts.*** Jeffrey Bubna is a devoted member of the Christian faith. The son of a Christian & Missionary Alliance Pastor, Bubna has attended the Christian Church his entire life, has served as an elder or board member[6] of his church, and leads a bible study group for men. (Exc. 188) As a Christian, Bubna's religious beliefs are founded upon the Bible, which he believes to be the absolute, true, and infallible word of God. (Exc. 65, 79, 188, 236, 259)

Bubna has two religious beliefs that are central to this case. First, he believes that cohabitation between unmarried couples constitutes the sin of fornication and is grievously offensive to God.[7] (Exc. 65-66, 79-80, 188, 236-37, 259-60) Second, he believes that if he were to assist or facilitate someone else's cohabitation, he would commit sin himself, render himself a hypocrite, and disqualify himself from serving as an Elder or Deacon in the Christian church. (Exc. 65-66, 79-80, 189, 236-38, 259-61)

Bubna's religious beliefs regarding cohabitation are rooted in a widely held tradition within Christianity extending from the Old Testament to the New Testament, and to the

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[6]An "Elder" or "Deacon" in the Christian Church is a man who oversees the affairs of the church. The Bible delineates the qualifications of an Elder and Deacon. Although some churches make a distinction between the two, a church "board member" is essentially the modern day equivalent of an "elder." [Exc. 65, 79, 188-89 *quoting* I Timothy 3:1-7; Titus 1:5-9]

[7]To "cohabit" means "to live together in a sexual relationship when not legally married." *The American Heritage Dictionary* 259 (1980).

teachings of Christ, the Apostle Paul, the Apostle Peter, and the Reformation leader John Calvin.[8] Bubna sincerely believes that marriage between a man and a woman is the only relationship, created by God, in which two people are to live together in sexual intimacy. (Exc. 189, 237, 260)

Bubna owns and manages residential rental properties within the Greater Anchorage Borough. (Exc. 190) Bubna lives with his family in one unit of one residential building and rents other units in that building to tenants. *Id.*[9] Bubna's rental business is significantly impacted by his Christian faith because he commits himself to practice his beliefs in all aspects of his life, including his commercial activities. (Exc. 190, 238, 261) Bubna rents property without regard to race, religion, gender, and marital status.[10] However, based solely upon his Christian

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[8]*Old Testament*: *Genesis* 2:24; *Exodus* 22:16; *Leviticus* 19:20; *Deuteronomy* 22:13-21, 23:17; *Proverbs* 2:16, 5:3-6, 6:24-29, 7, 29:3; *Ecclesiastes* 7:26; *Hosea* 4:11. *New Testament*: *Acts* 15:19-20; *Jude* 7; *Revelation* 2:14, 21:18, 22:15. Jesus Christ: *Matthew* 15:16-20; *Mark* 7:18-23. *Apostle Paul*: *Romans* 1:29; *I Corinthians* 5:9-11, 6:9; *II Corinthians* 12:21; *Galatians* 5:19-21; *Ephesians* 5:5; *Colossians* 3:5-6; *I Thessalonians* 4:3-4; *I Timothy* 1:8-11; *Hebrews* 13:4. *Apostle Peter*: *I Peter* 4:1-6. *Calvin*: John Calvin, *Calvin's Commentaries: The Epistles of Paul to the Romans and to the Thessalonians* 359 (David W. Torrance & Thomas F. Torrance, eds. Ross Mackenzie trans., 1960).

[9]Bubna owns rental property consisting of (a) a tri-plex; and (b) a single family house. Bubna lives with his family in the upstairs unit of the tri-plex. Tenants in the two downstair units use separate entrances to their homes, but share some common driveway and yard with Bubna. (Exc. 191)

[10]Bubna rents to persons of all races, of any religion, of both genders, single persons, men and women married to one another, separated or widowed persons, single parents and grandparents. (Exc. 190, 238, 261) Bubna has never declined to rent to anyone because of their race, national

beliefs, Bubna will not rent to unmarried couples who cohabit. *Id.* Bubna offers his properties for rent under management policies which prohibit rental to unmarried cohabitors.

Every time Bubna offers or lists property for rent, he does so to the exclusion of unmarried cohabitors. (Exc. 190-91, 238-39, 261-62) Bubna has previously declined to rent to unmarried cohabitors. (Exc. 190-94, 238-42, 261-65)[11] Bubna continues in this rental practice and periodically is required to turn unmarried cohabitors away in order to remain true to his Christian convictions. *Id.* Bubna experiences on average about one vacancy per year in his rental units. *Id.* When trying to fill a vacancy, Bubna is presented with at least one, sometimes more, unmarried cohabiting couples who inquire about renting from him. *Id.*[12]

The Alaska and Anchorage housing laws require landlords to rent residential property to unmarried cohabitors regardless of religious beliefs. *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199 (Alaska 1989); *Swanner*, 874 P.2d 274 (App. 33a); *Thomas*, 102 P.3d at 940 (App. 4a). The laws prohibit Bubna from offering properties for rent pursuant to his religiously based policies. AS 18.80.240(4) (App. 69a);

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origin, religion, gender, age, parental status, or divorced status. *Id.* Bubna never uses his religious beliefs as a disguise for other discrimination. *Id.*

[11]Bubna always asks for or determines a potential tenant's marital status. He also informs unmarried cohabitors of his religious beliefs regarding marriage and cohabitation because he believes that it would be contrary to God's will to lie, and because he believes that he should stand up and be recognized as Christ's follower. *Id.*

[12]Bubna would violate the local housing laws if he made or kept records of the marital status of potential tenants. AS 18.80.240(3) (App. 69a); AMC 5.20.020(C) (App. 71a).

AMC 5.20.020(D) (App. 71a). The laws prohibit Bubna from engaging in religiously motivated speech by (1) inquiring of the marital status of potential tenants;[13] or (2) making any communication or statement which indicates a preference against renting to unmarried cohabitors.[14]

3. The Federal Constitutional Questions Were Timely And Properly Raised. Bubna filed a complaint for injunctive and declaratory relief arguing the local housing laws violate the Free Exercise Clause. Bubna also challenged the speech provisions of the laws under the Free Speech Clause. The Alaska superior court granted summary judgment dismissing Bubna's claims. (App. 22a-31a) Bubna timely appealed to the Alaska Supreme Court. On December 10, 2004, the Alaska Supreme Court affirmed. In so doing, the Alaska Supreme Court reaffirmed its decision in *Swanner*. *Thomas*, 102 P.3d at 943 and n. 34 (App.11a-12a)

REASONS FOR GRANTING THE WRIT

The Alaska Supreme Court's decision conflicts directly and in principle with decisions from several United States Circuit Courts of Appeal and also other state supreme courts. Sup. Ct. R. 10(b). This Court should grant the petition and review the Alaska Supreme Court's decision in order to resolve the disagreement among the lower courts.

There is substantial disagreement among federal Circuit Courts and state supreme courts regarding the correct meaning

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[13] AS 18.80.240(3) (App. 69a); AMC 5.20.020(C) (App. 71a).

[14] *See* AMC 5.20.020(C) (App. 71a).

and application of *Smith* and *Lukumi* and the general applicability and "hybrid rights" doctrines. In fact, there is substantial disagreement among federal circuit courts and state supreme courts regarding the existence of a "hybrid rights" doctrine. This Court should grant the petition to resolve the disagreements among the lower courts. Sup. Ct. R. 10(a), (b).

The Alaska Supreme Court's decision is in error because it "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court should grant the petition and review the Alaska Supreme Court's decision in order to correct the error.

This case presents important recurring unanswered questions of Constitutional law which should be settled by this Court. Sup. Ct. R. 10(c). This Court should delineate the correct meaning and application of *Smith* and *Lukumi* and the general applicability, neutrality, and "hybrid rights" doctrines.

I. THE ALASKA SUPREME COURT'S DECISION CONFLICTS DIRECTLY AND IN PRINCIPLE WITH DECISIONS FROM THE FEDERAL CIRCUITS AND OTHER STATE SUPREME COURTS

This Court's review is warranted because the Alaska Supreme Court's decision conflicts directly and in principle with decisions of federal circuit courts of appeal and other state supreme courts regarding the proper interpretation and application of *Smith* and *Lukumi*. More precisely, there is substantial conflict between the Alaska Court's decision and federal circuit and state supreme court decisions regarding the "general applicability," "neutrality," and "hybrid rights" concepts enunciated in *Smith* and *Lukumi*.

A. Conflicts Regarding General Applicability. By concluding that the Alaska and Anchorage housing discrimination laws are generally applicable and neutral toward religion despite their categorical exceptions that permit discrimination on the basis of marital status and other bigoted basis,[15] the Alaska Supreme Court brought itself into direct conflict with decisions of the Third and Eleventh Circuits. The Alaska Court believes that proof of "discriminatory intent or impact" is necessary to demonstrate that a law lacks general applicability.[16] Unlike the Alaska Supreme Court, the Third and Eleventh Circuits have taken a broad, straight forward approach when interpreting and applying the "general applicability" component of *Smith* and *Lukumi*.

In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 360-61 (3rd Cir. 1999), the Third Circuit struck down a Police Department policy that required police officers to be "clean-shaven" and forbade them from wearing beards. The policy contained an exception for officers with medical conditions but contained no exception allowing beards for religious reasons. Applying *Lukumi*, the Third Circuit held that the Department's policy was subject to and failed strict scrutiny

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[15] *See Swanner*, 874 P.2d at 280 ("these laws are generally applicable" "[t]hey apply to all people involved in renting or selling property, and do not specify or imply applicability to a particular religious group.") (App. 42a).

[16] *See Thomas*, 102 P.3d at 940, 944 ("we concluded that Swanner's federal constitutional rights had not been violated, since the challenged anti-discrimination laws are neutral and generally applicable provisions. . . . The landlords' arguments rely largely on the state statute's exception for "singles only" and "married couples only" classes of housing. The superior court found no evidence that this exception had any discriminatory intent or impact. Despite their strenuous protests to the contrary, the landlords offer no persuasive reason to challenge the superior court's findings.") (App. 5a).

under the free exercise clause because it was under-inclusive in a way that devalued religious motivation and undermined the Department's claimed objectives. *Id.* The Third Circuit has consistently adhered to this broad and straight forward interpretation of "general applicability." *See, e.g., Blackhawk v. Pennsylvania*, 381 F.3d 202, 208-09 (3rd Cir. 2004); *Tenafly Eruv Ass'n, Inc. v. The Borough of Tenafly*, 309 F.3d 144, 165-72 (3rd Cir. 2002).[17]

The Eleventh Circuit has given "general applicability" a similar broad and literal interpretation. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-34 (11th Cir. 2004), the Eleventh Circuit held that a municipal zoning ordinance "violated Free Exercise requirements of neutrality and general applicability" because it excluded churches and synagogues from business districts but permitted private clubs and lodges. The Court found that the zoning ordinance treated "religious assemblies differently than secular assemblies by excluding religious assemblies from the business district." *Id.* at 1233. The Eleventh Circuit declared that "[u]nder *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law." *Id.* at 1234 n. 16.

The Alaska Supreme Court's "general applicability"

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[17]In *Blackhawk*, the Third Circuit held that a permitting scheme for owning wild animals was not generally applicable because it contained broad exceptions that waived the permit requirement for most zoos, nationally recognized circuses, and also in cases of hardship or extraordinary circumstances as determined by the Game Commission director. 381 F.3d at 208-09. In *Tenafly*, that Third Circuit ruled that a Borough's selective enforcement of an ordinance prohibiting the affixing of signs to utility poles lacked general applicability and was subject to strict scrutiny because the Borough had allowed private citizens to affix various materials to utility poles while excluding Orthodox Jewish lechis. 309 F.3d at 165-72.

decisions in *Swanner* and *Thomas* conflict directly with the Third Circuit's decisions in *Fraternal Order*, *Blackhawk*, and *Tenafly* and the Eleventh Circuit's decision in *Midrash*. The Alaska Court concluded that these housing discrimination laws are generally applicable despite the fact that they are substantially under-inclusive in ways that devalue religious motivation and undermine the governments' claimed objectives.[18] Pointedly, the Alaska Court rejected Bubna's general applicability challenge while concluding that under the categorical exceptions he can himself engage in housing discrimination on the basis of marital status, including discrimination against unmarried cohabiting couples, if only he would just forfeit his ability to rent to a large portion of the rental market (all singles) and discriminate to a greater degree than his religious convictions require.[19]

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[18] *Swanner*, 874 P.2d at 279-80 (App. 40a-42a); *Thomas*, 102 P.3d at 940, 944-45 4a-5a, 15a-16a).

[19] "The landlords' arguments rely largely on the state statute's exception for 'single's only' and 'married couples only' classes of housing. . . . [B]oth the legislative history of this exception and the state commission's interpretation of it in past litigation suggest that the legislature intended that the exception would allow landlords considerable latitude to designate particular units or blocks of apartments as 'single's only' or 'married couples only,' provided that the landlords established these classifications before offering the properties for rental – thus eliminating the risk of discriminating against prospective tenants on a case-by-case basis. The landlords do not assert that their religious beliefs compel them to rent to classes of tenants other than 'singles only' or 'married couples'; nor do they satisfactorily explain why they could not take advantage of this exception to mitigate any financial hardship they might otherwise experience by complying with the anti-discrimination provision." *Thomas*, 102 P.3d at 944-45 (App. 16a). Contrary to the Alaska Court's suggestion (*Id.* at 945), Bubna would suffer financial detriment if he took advantage of the "married housing" exception because he would be unable to rent to the entire class of single tenants, a sizeable portion of the rental market. *See* America's Families and Living Arrangements: 2003 (Population Characteristics),

The Alaska Court's ruling emphasizes how these laws devalue Bubna's religious conviction in comparison to secular motivation. Both laws freely permit social segregation in which a landlord for any reason rents only to married couples and then discriminates against all single tenants (including cohabitors).[20] But, a landlord's religious motivation for engaging in a smaller degree of the same conduct is tolerated only if it is secondary to a broader social segregation policy. 102 P.3d at 945. (App. 16a) In the case of a common living area unit, the laws even permit bigoted discrimination on the basis of race, color, national origin, religion, and sex. *See* 6 AAC 30.990(d) (App. 73a); AMC 5.20.020(A) (App. 71a). Bubna's religiously motivated practice of declining rental on a case-by-case basis only to one small subset of the larger class of single tenants (unmarried cohabiting couples), is proscribed and penalized.

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http://www.census.gov/prod/2004pubs/p20-553.pdf (U.S. Census Bureau Nov. 2004) (hereafter "Census").

[20]Because the State statute allows landlords to maintain and operate "'married couples' only" housing, the Municipality's ordinance can make no lesser allowance regardless of the fact that it contains no similar express exception. By operation of Article X, Section 11 of the Alaska Constitution, the Municipality of Anchorage is not entitled to criminalize or prohibit by ordinance conduct which the Alaska Legislature has declared lawful or permissible by statute. *See McCormick v. City of Dillingham*, 16 P.3d 735, 740 (Alaska 2001); *Kodiak v. Jackson*, 584 P.2d 1130, 1131-32 (Alaska 1978). A municipal ordinance is preempted when it is either (1) in direct conflict with a state statute; or (2) "where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose." *McCormick*, 16 P.3d at 740-41. The Alaska Court's decision in *Thomas* confirms that the married housing exception controls both laws at issue in this case. 102 P.3d at 944-45 ("nor do they satisfactorily explain why they could not take advantage of this exception") (App. 16a).

These laws devalue religious conviction in comparison to secular motivation and undermine the governments' claimed objectives. Housing discrimination on the basis of marital status, and even pure bigotry, is freely allowed provided that landlords discriminate to a greater degree than Bubna's religious convictions require. Bubna's religious convictions are tolerated only if they are secondary to a broader discriminatory policy of social segregation.

Swanner "drain[ed] the word compelling of any meaning" (*Swanner*, 513 U.S. at 982 (Thomas, J., dissenting from cert. denied)) and now *Thomas* does the same to the phrase "generally applicable." 102 P.3d at 944-45 (App. 16a). Borrowing the language of *Lukumi*, Alaska and Anchorage do not ban social segregation in housing as between married and single people in order to avoid the "social evil" of discrimination, but they do ban a religious landlord's exclusion of unmarried cohaitors on a case-by-case basis to avoid religiously motivated discrimination. *Thomas*, and *Swanner* directly conflict with the Third and Eleventh Circuit's "general applicability" decisions.

The Alaska Court's "general applicability" ruling also conflicts with decisions of the Washington Supreme Court. *See First Covenant Church v. City of Seattle*, 840 P.2d 174, 214 (Wash. 1992); *First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Preservation Bd.*, 916 P.2d 374, 379-80 (Wash. 1996). The Washington Court concluded that Seattle's landmark ordinance was not a neutral law of general applicability because "[i]t contained an exemption permitting alterations 'necessitated by changes in liturgy'" which "'invite[d] individualized assessments of the subject property' and singled out religious facilities in its references to 'liturgy.'" *First United*, 916 P.2d at 378 (*citing and quoting First Covenant*, 840 P.2d at 214). The Washington Court focuses its general applicability examination upon the

existence and scope of exceptions to an otherwise general prohibition. By contrast, the Alaska Court melds general applicability with neutrality and searches for "discriminatory intent or impact." *Thomas*, 102 P.3d at 944 (App. 16a).[21]

B. Conflict Regarding Hybrid Rights. The Alaska Court concluded that *Smith* creates a hybrid rights doctrine.[22] This ruling conflicts directly with decisions of the Second and Sixth Circuits. The Second and Sixth Circuits decline to recognize hybrid rights. *See Leebert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003) (hybrid right may not exist and if it does, it does not warrant strict scrutiny); *Prater v. City of Burnside*, 289 F.3d 417, 430-31 (6th Cir. 2002) (declining to recognize hybrid rights until further direction from Supreme Court); *Watchtower*

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[21]The Alaska Court's "general applicability" ruling also conflicts directly and in principle with decisions from the Virginia Court of Appeals and federal district courts. *See Horen v. Commonwealth*, 479 S.E.2d 553, 742-44 (Va. App. 1997) (law prohibiting the possession of bird feathers lacked neutrality because it contained categorical exceptions for taxidermists, academics, researchers, museums and educational institutions); *Murphy v. Zoning Comm'n of the Town of New Milford*, 289 F. Supp. 2d 87, 106 (D. Conn. 2003) (cease and desist order under zoning law lacked general applicability because it was directed exclusively at home church and denied it a subjectively based exception); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (landmark law with secular exemptions was not generally applicable); *Rader v. Johnston*, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (Univeristy policy that required freshmen to live on campus, allowed freshmen to live off campus for multiple secular reasons but refused any religious reasons, lacked general applicability).

[22]*Thomas*, 102 P.3d at 943-44 ("*Swanner* did not ignore or overlook the 'hybrid' rights exception to *Smith*'s general rule. Although *Swanner* found no need to discuss the theory, our observation in *Swanner* that no 'hybrid' violation had been alleged demonstrates our recognition of the theory and our implicit view that it had no clear and obvious application to the matter at issue.") (App. 13a-14a)

Bible and Tract Society of New York, Inc. v. Village of Stratton, 240 F.3d 553, 561 (6th Cir. 2001) (calling the hybrid rights discussion in *Smith* dicta); *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993) (refusing to recognize hybrid rights until Supreme Court confirms the doctrine).

The Alaska Court's conclusion that Bubna does not present a valid hybrid rights claim in circumstances where his religious liberty is burdened in conjunction with his rights to own and control real property and to free speech, conflicts directly and in principle with decisions from the Third, Fourth, Eighth, Ninth, Tenth, and District of Colombia Circuits. *See Salvation Army v. Department of Comm. Aff'rs*, 919 F.2d 183, 196-201 (3rd Cir. 1990) (hybrid exists if second constitutional claim is colorable); *Reich v. Shiloh True Light Church of Christ*, 1996 WL 228802 (4th Cir. 1996) (per curiam) (hybrid existed in the context of a Church's youth work program); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-473 (8th Cir. 1991) (remanding in light of prima facie hybrid rights claims); *Miller v. Reed*, 176 F.3d 1202, 1207-08 (9th Cir. 1999) (second constitutional right must be colorable); *Swanson v. Guthrie Ind. Sch. Dist.*, 135 F.3d 694, 699-700 (10th Cir. 1998) (same); *Thiry v. Carlson*, 78 F.3d 1491, 1495-96 (10th Cir. 1996) (same); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 467 (D.C. Cir. 1996) (hybrid recognized without colorable claim requirement).[23]

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[23] *See also Commonwealth v. Miller*, 2002 WL 31426193 (Ct. Comm. Plea. Pa. 2002) (finding that a hybrid religion/speech claim in the context of a motor vehicle ordinance requiring Amish to display slow-moving-vehicle emblems on horse-drawn buggies); *City Chapel Evangelical Free, Inc. v. City of South Bend*, 744 N.E.2d 443, 451-454 (Ind. 2001) (finding a hybrid claim for a church challenging a city's condemnation of church property); *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992) (finding hybrid claim and applying strict scrutiny); *New York State Empl. Rel. Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960

C. Conflict Regarding The Right of Religious Landlords to Refuse Rental to Unmarried Cohabiting Couples. State supreme courts that have considered whether religious landlords are entitled to a free exercise exemption allowing them to decline rental to unmarried cohabitors have applied the *Sherbert/Yoder* compelling interest test, and have reached conflicting conclusions. Unlike the Alaska Court, the Minnesota Supreme Court has held that government does not have a compelling interest to eradicate housing discrimination against unmarried cohabitors and has granted a free exercise exemption to landlords. *See Minnesota v. French*, 460 N.W.2d 2 (Minn. 1990). On nearly identical facts (*See Id.* at 3-4, 9-10), the Minnesota Court determined that the state has no compelling interest to eradicate discrimination against unmarried cohabitors. *Id.* at 9-10. Although the Alaska Court styled Bubna's religiously based conduct as an "independent social evil" (874 P.2d at 283; App. 48a), the Minnesota Court concluded that French's religious convictions reflect moral values that form the foundation for our nation's fundamental institutions. 460 N.W.2d at 11. Confirming the conflict in principle, the Alaska Court cited *French* and rejected the Minnesota Court's reasoning. (*Swanner*, 874 P.2d at 281 n. 10; App. 44a)

The Massachusetts Supreme Court has likewise issued a decision on this exact issue that conflicts in principle with *Thomas* and *Swanner*. *See Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994). On nearly identical facts (*See Id.* at 3-4, 9-10), the Massachusetts Court determined that the state has no *per se* compelling interest to eradicate discrimination based upon marital status or against unmarried cohabitors. The Massachusetts Court refused to equate the

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(N.Y. 1997); *First United*, 916 P.2d 374 (finding hybrid claim for free exercise and free speech).

constitutional significance of marital status discrimination with that of race or gender discrimination and held that government cannot override free exercise by asserting a broadly defined interest in eliminating discrimination generally. 636 N.E.2d at 236. Confirming the conflict in principle, the Massachusetts Court cited *Swanner* and declined to adopt its reasoning. *Id.*

Finally, the California Supreme Court has issued a decision on this exact issue that conflicts in principle with *Thomas* and *Swanner*. In *Smith v. Fair Empl. & Hous. Comm'n*, the California Supreme Court held that housing discrimination laws mandating rental to unmarried cohabitors do not substantially burden a religious landlords' free exercise because a landlord can choose to leave the rental business. 913 P.2d 909, 924-29 (Cal. 1996) *cert. denied* 521 U.S. 1129 (1997). By contrast, *Swanner*, now reaffirmed in *Thomas*, concludes that such laws create a burden (albeit permissibly) on the free exercise of religious landlords. 874 P.2d at 281 (App. 44a-45a).

II. THERE IS SUBSTANTIAL DISAGREEMENT AMONG THE FEDERAL CIRCUITS AND ALSO STATE COURTS REGARDING THE CORRECT MEANING AND APPLICATION OF *SMITH* AND *LUKUMI*

A. Conflict Regarding General Applicability. There is substantial disagreement among federal circuit courts, circuit judges, and state courts regarding the correct meaning and application of *Smith*'s and *Lukumi*'s "general applicability" requirement. The Third and Eleventh Circuits have interpreted "general applicability" literally and have applied it broadly so as to trigger strict scrutiny of any law containing express exceptions that devalue religious motivation and undermine legislative objectives. *See Blackhawk*, 381 F.3d at 208-09;

Tenafly, 309 F.3d at 165-72; *Fraternal Order*, 170 F.3d at 360-61; *Midrash*, 366 F.3d at 1232-34. The Washington Supreme Court has given "general applicability" a similar broad interpretation and application. *See First Covenant*, 840 P.2d at 181; *First United*, 916 P.2d at 379-80.[24] The Virginia Court of Appeals has given the same broad interpretation to the "neutrality" concept. *See Horen*, 479 S.E.2d at 742-44.

By contrast, the Tenth and District of Colombia Circuits and the Alaska and California Supreme Courts have declined to give "general applicability" a broad, literal application. Rather than focus upon the facial breadth of express exceptions to general legal proscriptions, these Courts have respectively required a detailed factual analysis of whether government enforcement of the law has been general and neutral toward religion, or proof that the object of the law is to target, infringe or restrict practices because of religious motivation. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294, 1297-98 (10th Cir. 2004) (express exceptions to a University policy for some students in some non-religious circumstances did not trigger strict scrutiny when the University refused to allow a Mormon student a religious exemption – but finding a genuine issue of material fact as to whether the University's policy was actually enforced generally); *American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1171 (D.C. Cir. 2004) ("the differential impact of the point system . . . is neither similarly severe and targeted"); *Thomas*, 102 P.2d at 944 ("no evidence that this exception had

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[24]Some federal district courts have likewise given "general applicability" the same literal and broad application. *See Murphy*, 289 F. Supp. 2d at 106-07; *Keeler*, 940 F. Supp. 879 (landmark law with secular exemptions but no religious exemptions was not generally applicable); *Rader*, 924 F. Supp. at 1551-53) (University policy which required freshmen to live on campus but which allowed freshmen to live off campus for multiple secular reasons while at the same time refusing religious reasons, lacked general applicability).

any discriminatory intent or impact"); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 87-89 (Cal. 2004) (a law that provided a "religious organization" exemption was "generally applicable" when applied to a religious non-profit organization).[25]

B. Conflict Regarding Hybrid Rights. There are significant disagreements among the federal circuits and also state courts regarding the existence, meaning, and application of *Smith*'s hybrid rights doctrine. The Second and Sixth Circuits decline to recognize any hybrid rights doctrine. *See Leebert*, 332 F.3d 134; *Prater*, 289 F.3d at 430-31; *Watchtower*, 240 F.3d at 561; *Kissinger*, 5 F.3d 177. The First and Seventh Circuits recognize the hybrid doctrine but confine it to situations where the second constitutional claim is "independently viable." *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). The Third, Fourth, Eighth, Ninth, Tenth, and District of Colombia Circuits recognize the hybrid doctrine and require the second constitutional right to be "colorable" or "prima facie." *Salvation Army*, 919 F.2d at 196-201; *Reich*, 1996 WL 228802; *Cornerstone*, 948 F.2d at 472-473; *Miller*, 176 F.3d at 1207-08; *Swanson*, 135 F.3d at 699-700; *Thiry*, 78 F.3d at 1495-96; *Catholic Univ.*, 83 F.3d at 467. State courts have issued

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[25]Some Justices of the Ninth Circuit believe that there is no separate "general applicability" requirement but that instead a lack of "general applicability" or "underinclusion" is merely one piece of evidence that "indicates something more sinister," namely that a law in not neutral toward religion. *See Thomas*, 165 F.3d at 701-02 *withdrawn and reh'g en banc granted*, 192 F.3d 1208, 220 F.3d 1134 (case dismissed on jurisdictional grounds). This appears to be the same analysis applied by the Alaska Court in *Thomas*. 102 P.3d at 944 (App. 16a).

varying decisions related to the hybrid rights doctrine.[26] This Court should grant certiorari to resolve the conflict among the lower courts.

III. THE ALASKA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS REGARDING FREE EXERCISE AND STRICT SCRUTINY

A. Free Exercise – General Applicability. The Alaska Court's decision that these laws are generally applicable,[27]

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[26] *See Catholic Charities*, 85 P.3d at 87-89 (questioning the existence of the "hybrid rights" doctrine but finding no hybrid in the context of a law requiring the Catholic Church to provide contraception coverage to employees); *Commonwealth*, 2002 WL 31426193 (finding that a "hybrid" religion/speech claim was presented by a law requiring Amish to place slow-moving-vehicle emblems on their horse-drawn buggies); *City Chapel*, 744 N.E.2d at 453-54 (recognizing the "hybrid rights" doctrine and finding that a hybrid was presented in the context of the condemnation of a church building); *Health Services Div. v. Temple Baptist Church*, 814 P.2d 130, 135-136 (N.M. App. 1991) (recognizing "hybrid rights" doctrine but finding no hybrid was presented in the context of a church operated childcare facility); *Hill-Murray*, 487 N.W.2d 857 (recognizing the "hybrid rights" doctrine but finding no hybrid in the context of enforcing state labor relations laws against a religiously affiliated school); *Christ the King*, 682 N.E.2d at 964 (recognizing the "hybrid rights" doctrine but finding no hybrid in the context of enforcing state labor relations law against a religiously affiliated school); *First Covenant*, 840 P.2d at 181 (finding that "hybrid rights" were presented when a church building was designated as a landmark); *First United*, 916 P.2d 374 (same); *Thomas*, 102 P.3d at 944 (acknowledging the "hybrid rights" doctrine but finding no hybrid where laws force a property owner to rent to unmarried cohabitors and proscribe related religiously motivated speech) (App. 13a-14a); *Swanner*, 874 P.2d at 280 (same) (App. 42a).

[27] *Thomas*, 102 P.3d at 944 and n. 40 (App. 15a); *Swanner*, 874 P.2d at 280 (42a).

conflicts with *Lukumi*. *Lukumi* teaches that laws that contain exceptions and thus do not apply to everyone, laws which are "under inclusive" in a material way so as to undermine government objectives, are not generally applicable. 508 U.S. at 542-543. *Lukumi* expresses this Court's view that "general applicability" is "for the most part, self-explanatory" *(Id.* at 561), which implies that general applicability means exactly what it says – a law is generally applicable if it applies to everyone with no material exceptions that undermine government objectives. According to *Lukumi*, selective laws that devalue religious motivation and undermine the government's stated objectives are of paramount concern even when they only have the "incidental effect of burdening religious practice." *Id.* at 542. According to some members of this Court, a selective law that lacks general applicability *ipso fact* fails strict scrutiny. *Id.* at 579, (Blackmun and O'Connor, JJ., concurring).[28]

Here, in analogous contexts, Alaska and Anchorage either do not pursue their asserted interests at all, or they pursue them to a lesser degree. These laws contain categorical exceptions that allow the so-called "social evil" of "discrimination" in housing on the basis of marital status, and in the case of common-living-area units, even on bigoted basis.[29] Moreover, Alaska law itself "discriminates based on

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[28]*Lukumi* said that if there are other activities that cause comparable harms to the same governmental interests, and these activities are not regulated, the law is not generally applicable. 508 U.S. at 543.

[29]The exceptions are large enough to cover all of the plausible secular ground. If a landlord is marketing a singles or married only lifestyle complex, which is an economic marketing reason for the discrimination, his conduct is allowed. Marketing ploys that cater to consumer preferences for social segregation are exempted and landlords can freely exclude the whole classes of single or married tenants. The laws do not concern themselves

marital status in numerous regards." *See Swanner*, 874 P.2d at 288-89 (Moore, C.J., dissenting) (App. 62a-63a).

B. Free Exercise – Neutrality. A law which is not neutral toward religion must survive strict scrutiny. *Smith*, 494 U.S. at 878-881; *Lukumi*, 508 U.S. at 546; *Boerne*, 521 U.S. at 513-514. The facial neutrality of a law is not determinative. The Court's neutrality inquiry is not to "end with the text of the laws at issue." *Lukumi*, 508 U.S. at 534. "The Free Exercise Clause" "extends beyond facial discrimination" and "'forbids subtle departures from neutrality.'" *Id. quoting Gillette v. United States*, 401 U.S. 437, 452 (1971). "'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" *Id. quoting Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Likewise, the lack of any sinister intent by the Alaska Legislature or the Anchorage

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with "affronts" to "human dignity" (*Swanner*, 874 P.2d at 283) (App. 48a) arising from this secular discrimination. If a landlord thinks that either single or married people are more responsible and more likely to pay rent, also an economic reason, again he is exempted. In common-living-area units even sheer bigotry is exempted. 6 AAC 30.990(d) (App. 73a); AMC 5.20.020 (App. 71a). Every conceivable secular reason is accommodated, but not the sincerely held religious beliefs of landlords who want, on a case-by-case basis, to use one comparatively smaller basis of selection when choosing tenants. The laws here are different than the Promise Scholarship challenged in *Locke v. Davey*, 124 S. Ct. 1307 (2004). These laws contain both civil and criminal sanctions. *See* AS 18.80.270 (misdemeanor punishable by a $500 fine or up to 30 days in jail) (App. 70a); AS 18.80.100-.145 and AMC 5.30.010-.090. To comply with these laws a religious landlord must choose between either forfeiting his religious convictions or forfeiting his economic interests (by giving up renting to the entire class of "single" tenants. *See Thomas*, 102 P.3d at 944-45 (App. 16a); *Swanner*, 874 P.2d at 283-84 (App. 46a-52a); *Davey*, 124 S. Ct. at 1312. Unmarried tenants comprise a sizeable portion of the rental market. *See, e.g., Census*, http://www.census.gov/prod/2004pubs/p20-553.pdf.

Assembly to suppress religion is not determinative. *Id.*[30]

These laws are not neutral toward religion because they "curtail" "First Amendment Freedoms" in order "to prevent isolated collateral harms not themselves prohibited by direct regulation." *Lukumi*, 508 U.S. at 539. The laws "curtail" the Christian landlord from conducting his business and speaking based upon his religious motivations on a case-by-case basis in order to prevent the isolated collateral harm of protecting unmarried cohabitors from housing discrimination despite the fact that this discrimination is not prohibited by direct regulation in other broader contexts.[31]

C. Strict Scrutiny. Dissenting from the denial of certiorari in *Swanner*, Justice Thomas stated that he was "quite skeptical that Alaska's asserted interest in preventing discrimination on the basis of marital status is 'compelling' enough to satisfy" the stringent standards established by this Court in *Sherbert v. Verner* . . . *Wisconsin v. Yoder* . . . and *Bob Jones Univ. v. United States*. . . ." *See Swanner*, 513 U.S. at 980-981. Justice Thomas remarked: "If, despite affirmative

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[30]*Lukumi*, 508 U.S. at 558-559 (Scalia, J., joined by Rhenquist, C.J., concurring) ("Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.").

[31]Using the converse of Justice Harlan's question from *Walz*, this Court would evaluate "neutrality" by applying an "equal protection mode of analysis" and asking "whether the circumference of the legislation encircles a class so [narrow] . . . that it can be fairly concluded that religious[ly motivated individuals] could be thought to fall within the natural perimeter." *Walz*, 397 U.S. at 696 (Harlan, J., concurring).

discrimination by Alaska on the basis of marital status and a complete absence of any national policy against such discrimination, the State's asserted interest in this case is allowed to qualify as a 'compelling' interest – that is, a 'paramount' interest, an interest 'of the highest order' – then I am at a loss to know what asserted governmental interests are not compelling. The decision of the Alaska Supreme Court drains the word *compelling* of any meaning and seriously undermines the protection for exercise of religion...." *Id.* at 982.

Thomas and *Swanner* conflict directly and in principle with this Court's decision in *Dale*. *Dale* controls the First Amendment compelling interest analysis. *Dale* holds that a general state interest in preventing discrimination is not compelling when it is placed in opposition to a fundamental First Amendment interest. 530 U.S. at 645, 657-58. Bubna does not claim that *Dale* (an associational speech case) controls the entirety of this case (free exercise of religion/speech). Bubna simply asserts that once he establishes the applicability of First Amendment strict scrutiny, because the laws lack general applicability or neutrality or burden hybrid rights, then *Dale* is squarely on point to the compelling interest analysis.

In *Dale*, the New Jersey Court rejected the Boy Scout's claim because it, like the Alaska Court, determined "that New Jersey has a compelling interest in eliminating 'the destructive consequences of discrimination from our society.'" *Id.* at 647 (quoting 734 A.2d 1196, 1219 (N.J. 1999)). If this proposition were correct, Dale and not the Boy Scouts would have won. This Court, however, held that there was no compelling interest and that New Jersey's anti-discrimination law failed when it was placed in opposition to a fundamental First Amendment right. *Id.* at 659. *Accord Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557

(1995).[32]

Moreover, this Court requires a compelling government interest to be narrowly drawn. In *Yoder*, the State of Wisconsin was not allowed to justify forcing Amish children to attend school beyond the 8th grade by claiming a generalized interest in education. 406 U.S. at 221. This Court required Wisconsin to show a compelling justification for the interest of ensuring that children receive an education beyond the 8th grade. *Id.* Because Wisconsin could not demonstrate a compelling justification for that narrowly drawn interest, the Amish were exempt. *Id.* at 215-225. Likewise, in *Thomas v. Review Bd.* this Court did not allow the State of Indiana to assert the broadly defined interests of trying to avoid widespread unemployment, the consequent burden on the state's unemployment fund, and detailed probing of individual religious beliefs. 450 U.S. 707, 718-19 (1981). Despite finding these interests "by no means unimportant," this Court narrowed the inquiry and found Indiana's specific interests non-compelling. *Id.* at 719.

Alaska and Anchorage, like Wisconsin in *Yoder* and Indiana in *Thomas*, cannot justify their burden on Bubna's free exercise of religion by claiming a broad government interest. They can justify burdening Bubna's free exercise only by

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[32]*Dale* is also inconsistent with the Alaska Court's concept of a transactional compelling interest, in which the state need not show that anyone is really hurt or having trouble finding housing. *Swanner*, 874 P.2d at 283. The Alaska Court's thought that *Dale* is limited to the application of anti-discrimination laws to "private groups," ignores that the Boy Scouts are a public accommodation under New Jersey law. *Dale*, 530 U.S. at 657-60. This thought also ignores *Hurley* which addressed the application of a similar anti-discrimination law to a "parade." 515 U.S. at 580. Bubna's single-family residential rental units are not the equivalent of "restaurants, bars and hotels." *Dale*, 530 U.S. at 657.

demonstrating a narrowly defined compelling interest. The narrowly defined interest in this case is to deter discrimination in housing against unmarried cohabitors. Contrary *to Thomas* and *Swanner*, this interest is far from compelling and it cannot justify burdening Bubna's free exercise – particularly not in light of these laws' enormous categorical exceptions.

There is not a federal compelling government interest to eradicate discrimination against unmarried cohabitors just because there is a compelling government interest to eradicate discrimination based upon race and gender. *See, e.g., Cleburne*, 473 U.S. at 440-41; *accord Bob Jones*, 461 U.S. at 592-95, 603-05; *Roberts*, 468 U.S. at 624-27. In *Bob Jones* the Court ruled that "the Government has a fundamental overriding interest in eradicating racial discrimination in education" because of the strong public policy against racial discrimination. The Court found the strong public policy against racial discrimination to be evidenced by a quarter of a century of pronouncements by the Court, myriad acts of Congress, and multiple Executive Orders. 461 U.S. at 592-95.

Unlike race and gender classifications, there is no strong historically recognized public policy against marital status classifications (specifically cohabitation). Rather, there is a historical and institutionalized favor for the marriage relationship over cohabitation. While this Court has recognized a fundamental right to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)), it has never found "marital status" classifications to be Constitutionally improper, nor has it ever equated "marital status" classifications with recognized suspect classifications. There is no "firm national policy" against marital-status discrimination.[33]

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[33]This Court has never accorded marital status any heightened scrutiny under the Equal Protection Clause, as it has both race and gender. Nor has

IV. THIS CASE INVOLVES IMPORTANT UNANSWERED QUESTIONS OF CONSTITUTIONAL LAW

Since *Smith* changed the landscape of free exercise law in 1990, lower courts have disagreed about the decision's meaning and application. *Lukumi* provided additional guidance regarding general applicability and neutrality, but disagreement nonetheless persists. Many state and local laws burden free exercise of religion "in conjunction with other constitutional protections." Many of these laws impose general rules of proscription on religious people while providing exceptions for secular conduct. The application of *Smith* and *Lukumi* to such laws is a recurring issue that lower courts address repeatedly. This Court should grant the petition to address the recurring questions.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Alaska Supreme Court.

Respectfully submitted,

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Dated: February 25, 2005

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any court of appeals, for that matter. *See Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir.1993); *cf. United States v. Omoruyi*, 7 F.3d 880, 881 (9th Cir.1993).

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court Nos. S-10883/10883
Superior Court No. 3AN-01-7003 CI

KEVIN THOMAS, JOYCE BAKER,
AND JEFFREY BUBNA,

Appellants/Cross-Appellees,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION;
THE MUNICIPALITY OF ANCHORAGE; and PAULA HALEY
in Her Official Capacity as the Executive Director of the
Alaska State Commission for Human Rights,

Appellees/Cross-Appellants.

[No. 5850 – December 10, 2004]

Before: BRYNER, Chief Justice, MATTHEWS, EASTAUGH, FABE, and CARPENETI, Justices.

OPINION

BRYNER, Chief Justice.

I. INTRODUCTION

The Alaska Statutes and the Anchorage Municipal Code both prohibit landlords from refusing to rent property to persons because of marital status.[1] Ten years ago, in *Swanner*

[1] AS 18.80.240; AMC 5.20.020.

v. Anchorage Equal Rights Commission, we held that enforcing these provisions against an Anchorage landlord who refused to rent to unmarried couples on religious grounds did not violate the landlord's right to free exercise of his religion.[2] In the present case, similarly situated landlords urge us to overrule *Swanner*, insisting that the state and municipal fair housing laws violate their freedoms of religion and speech, and other protected rights. But since the landlords have not clearly convinced us that *Swanner* was wrongly decided, or is no longer sound, or that more good than harm would be done by departing from precedent, we apply the rule of stare decisis and decline to reexamine our holding. Because *Swanner* controls the landlords' claims, we affirm the superior court's order dismissing the case.

II. BACKGROUND FACTS

Alaska Statute 18.80.240 makes it "unlawful . . . to refuse to sell, lease, or rent . . . real property to a person because of sex, marital status, [or] changes in marital status"; this statute further prohibits landlords from inquiring about the marital status of prospective tenants or representing to prospective tenants that property is not available because of the tenants' marital status.[3] Anchorage Municipal Code §5.20.020 sets out

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[2] 874 P.2d 274, 276 (Alaska 1994).

[3] AS 18.80.240(1), (2), (3) and (5) provide:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property
>
> (1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

parallel prohibitions.[4] The municipal code additionally precludes landlords from publishing any communication with

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> (2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;
>
> (3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;
>
> . . . .
>
> (5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race, religion, physical or mental disability, color, national origin, age, sex, marital status, change in marital status or pregnancy of that person or of any person associated with that person[.]
>
> In addition, AS 18.80.270 specifies that a person who wilfully violates these provisions commits a misdemeanor punishable by a $500 fine, thirty days in jail, or both.

[4] See AMC § 5.20.020(A), (B), (C), (E). Unlike the state statute, however, this provision of the Anchorage code exempts rental space in a landlord's individual home when the landlord and renter would share common areas. Specifically, the opening clause of AMC § 5.20.020 provides:

> Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to. . . .

respect to their rental property indicative of marital status discrimination.[5]

In 1994 we rejected a constitutional challenge to these provisions brought by Anchorage landlord Tom Swanner.[6] Swanner had a policy of refusing to rent or show property to unmarried couples based on his Christian religious beliefs.[7] After receiving complaints against Swanner, the Anchorage Equal Rights Commission filed proceedings against him and ultimately found that he had engaged in discriminatory conduct.[8] The superior court upheld this ruling, and Swanner appealed, asserting that the state and municipal anti-discrimination laws violated his rights to the free exercise of his religion under the United States and Alaska Constitutions.[9]

Our opinion in *Swanner* determined that there was no merit to these claims under either constitution. Applying the test set out by the United States Supreme Court in *Employment*

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[5] Specifically, AMC § 5.20.020(G) makes it unlawful for a lessor to:

> Circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental or real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex, color, national origin, marital status or physical or mental disability.

[6] *Swanner*, 874 P.2d at 276.

[7] *Id.* at 277.

[8] *Id.*

[9] *Id.*

Division, Department of Human Resources v. Smith[10]– which holds that the United States Constitution usually does not prohibit religious restraints arising incidentally from a neutral and generally applicable law – we concluded that Swanner's federal constitutional rights had not been violated, since the challenged anti-discrimination laws are neutral and generally applicable provisions.[11] Though we acknowledged that Smith creates an exception that would require proof of a compelling state interest in "a hybrid situation" where the facts indicated a possible violation of the Free Exercise Clause and some other constitutionally protected right, we found that Swanner's case did not present this kind of hybrid situation, pointing out that Swanner did not contend that any other constitutional right had been violated.[12] Our opinion in Swanner nevertheless applied a more stringent test in addressing Swanner's free exercise claim under the Alaska Constitution. Using the more protective requirements of *Sherbert v. Verner*, which we had previously adopted as a state constitutional measure in *Frank v. State*,[13] we concluded that the challenged laws passed constitutional muster because they furthered a compelling state interest by preventing marital status discrimination and were narrowly tailored.[14] And relying on the same conclusion, we separately held that the disputed laws would withstand federal review under the strict

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[10] 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

[11] *Swanner*, 874 P.2d at 279-80.

[12] *Id.*

[13] 604 P.2d 1068, 1070 (Alaska 1979) (applying compelling state interest test adopted in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)).

[14] *Swanner*, 874 P.2d at 280-84.

scrutiny test then recently enacted by Congress in the Religious Freedom Restoration Act of 1993.[15]

Soon after *Swanner* was published, Kevin Thomas and Joyce Baker filed suit in the United States District Court in Anchorage, asserting that the Alaska and Anchorage anti-marital discrimination laws violated their free exercise rights under the United States Constitution, and seeking a declaratory judgment enjoining the state and the municipality from enforcing those provisions. Thomas and Baker are Anchorage landlords who are similarly situated to Swanner; their positions and claims in the federal court have been described as follows:

> Kevin Thomas and Joyce Baker (the "landlords") individually own residential rental properties in Anchorage, Alaska. Both are devout Christians who are committed to carrying out their religious faith in all aspects of their lives, including their commercial activities as landlords. Central to their faith is a belief that cohabitation between an unmarried man and an unmarried woman is a sin. The landlords also believe that facilitating the cohabitation of an unmarried couple is tantamount to committing a sin themselves. Based on this religious belief, the landlords claim that they have refused to rent to unmarried couples in the past and that they intend to continue to do so in the future.
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> . . . .
>
> The landlords brought this action against Paula Haley, the Executive Director of the Alaska State Commission for Human Rights, the Anchorage Equal

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[15] *Id.* at 280 n. 9.

> Rights Commission, and the Municipality of Anchorage, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C.§ 2201. They claimed that the threat of enforcement of the marital status provisions of the anti-discrimination laws infringed their First Amendment rights to free exercise of religion and free speech. Specifically, they argued that their religious beliefs precluded them from renting to unmarried couples and that the laws restricted their ability to communicate those beliefs through advertising or by inquiring about the marital status of prospective tenants.[16]

The federal district court granted summary judgment to the landlords, declaring that the state and municipal prohibitions of marital discrimination violated their free exercise rights. A divided panel of the Ninth Circuit affirmed this ruling.[17] But the court subsequently granted rehearing en banc and withdrew the panel's opinion.[18] After rehearing the case, the en banc court vacated the judgment and ordered the landlord's action dismissed; describing the action as "a case in search of a controversy,"[19] the court ruled that the landlords' constitutional

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[16] *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1137-38 (9th Cir.2000) (en banc), *cert. denied*, 531 U.S. 1143, 121 S.Ct. 1078, 148 L.Ed.2d 955 (2001).

[17] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir.1999), *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir.1999).

[18] *Thomas v. Anchorage Equal Rights Comm'n*, 192 F.3d 1208 (9th Cir.1999).

[19] *Thomas*, 220 F.3d at 1137.

claims should not have been decided on their merits, since the action was not ripe for judicial review.[20]

Joined by another similarly situated Anchorage landlord, Jeffrey Bubna, Thomas and Baker then refiled their case in the Alaska Superior Court. Their superior court action asserted essentially the same "hybrid" violation of free exercise rights that Thomas and Baker had raised in the preceding federal action. The landlords also alleged independent violations of their constitutional rights to free speech and equal protection. In addition, the landlords asked that our decision in *Swanner* be overruled.

Ruling on cross-motions for summary judgment, Superior Court Judge Sharon Gleason rejected these claims. Specifically, the court declined to overrule *Swanner*, finding that the decision remained controlling law in Alaska and was binding on the superior court. The superior court also found *Swanner* controlling on the landlords' free exercise claims, concluding that our opinion in *Swanner* "expressly and unequivocally rejected" their arguments. Last, the court rejected the landlords' claims that the anti-discrimination laws violated their rights to free speech and equal protection. Addressing the free speech claim, the court ruled that, when interpreted narrowly in light of their statutory purpose the challenged provisions extended only to narrow "limitations on commercial speech" occurring in the context of specific "activities undertaken as preliminaries to real estate transactions." The court thus declined to find them impermissibly vague or overbroad. And as for the landlords' equal protection claim, the superior court simply found no merit to their theory that the laws have a disparate impact by creating exceptions that "permit discrimination for secular

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[20] *Thomas*, 220 F.3d at 1142.

reasons while forbidding landlords from excluding unmarried cohabitants for religious reasons."

The landlords appeal, renewing their arguments on their free speech and free exercise claims and urging us to overrule *Swanner*.

III. DISCUSSION

A. Ripeness

We must initially consider the issue of ripeness for judicial review. Relying primarily on the Ninth Circuit's en banc decision and on our own ruling in *Brause v. State, Department of Health & Social Services*,[21] the Alaska Commission for Human Rights insists that "the superior court should have declined to rule on the merits of the Landlords' case and should have dismissed it outright." But the commission's arguments are unconvincing.

The federal court's ruling on ripeness has little bearing on our own determination of the issue. Ripeness is an aspect of standing,[22] and we have often noted that Alaska's standing requirements are more lenient than their federal counterpart, since they favor ready access to a judicial forum.[23] We have consistently found this difference to be important, emphasizing

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[21] 21 P.3d 357 (Alaska 2001).

[22] *See, e.g., Brause*, 21 P.3d at 359 n. 6, (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER AND RICHARD D. FREER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532.1, at 101 (Supp.2000)).

[23] *See, e.g., Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987) ("We have 'departed from a restrictive interpretation of the standing requirement,' adopting instead an approach 'favoring increased accessibility to judicial forums.' ") (internal citations omitted).

the need to follow our "own unique . . . jurisprudence if Alaska standing doctrine is to retain its quality of relative openness."[24]

As for the commission's reliance on Brause, the case is inapposite. There, a homosexual couple challenged a state law claiming that it denied them the same benefits it gave married couples.[25] Even though the statute nominally applied to the appellants, we found their declaratory judgment action unripe because their constitutional challenge appeared to be purely hypothetical: they failed to identify any actual harm they might suffer, even assuming that the state continued to enforce the disputed provision.[26] Here, in sharp contrast to the situation we addressed in *Brause*, it seems obvious that the landlords stand to suffer actual prejudice if the state or municipality enforces the challenged laws against them. Indeed, the commission does not seriously dispute this proposition; it argues instead that the landlords cannot sue unless and until these provisions are actually enforced against them. But the record shows a recent history of active enforcement; and the commission does not disavow the possibility of future enforcement. In effect, then, the commission is asking us to hold that the landlords must rely on its good graces and hope for the best until it files charges.

We have never imposed such a stringent requirement as a condition of ripeness or standing. In *State v. Planned Parenthood*, a case decided after *Brause*, the state advanced a similar argument in an attempt to defeat the claims of two physicians who sought to challenge a law requiring parental

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[24] *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 n. 5 (Alaska 1988).

[25] *Brause*, 21 P.3d at 357-58.

[26] *Id.*

consent to abortion.[27] The state contended that "both doctors lack standing because neither faces a specific threat of prosecution or alleges past prosecutions."[28] In rejecting this argument, we held that "the doctors need not allege such drastic harm to meet Alaska's lenient test of standing."[29] We went on to hold that the risk of enforcement alone sufficed for standing, since the challenged law "would require both doctors to change their current practices and would expose them to civil and criminal liability if they failed to comply."[30]

We see no sound basis for distinguishing *Planned Parenthood* from the present case. If we denied standing here, the landlords would similarly be forced to change their rental practices or expose themselves to civil and criminal liability. These circumstances are sufficient to meet Alaska's lenient test of standing. We conclude that the superior court did not abuse its discretion in refusing to dismiss the claims as unripe for judicial review.[31]

B. Stare Decisis

The commission advances a more convincing alternative argument against reaching the merits of the landlords' claims: even if we determine that the landlords have standing to raise

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[27] 35 P.3d 30, 34 (Alaska 2001).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Since Alaska law gives the trial court discretion to "declare the rights and legal relations of an interested party" in the case of an actual controversy with the state, see AS 22.10.020(g), we review the superior court's decision on justiciability for abuse of discretion. *See Brause*, 21 P.3d at 358.

their constitutional claims, the commission argues, "*Swanner* should be applied to deny . . . their requested relief under the common law principle of *stare decisis*."

The stare decisis doctrine rests on a solid bedrock of practicality: " 'no judicial system could do society's work if it eyed each issue afresh in every case that raised it.'"[32] In recognizing the importance of this doctrine, we have consistently held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling: "We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[33]

Here, the landlords' free exercise claims fall squarely within the ambit of our opinion in *Swanner*[34] Indeed, the landlords specifically seek to overrule *Swanner*, insisting that "Mr. Swanner was a landlord virtually identical to Thomas, Baker and Bubna." But while they strenuously criticize *Swanner*'s reasoning and holding in many respects, the landlords do not convincingly show good cause to revisit this precedent.

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[32] *Pratt & Whitney Canada, Inc. v. United Technologies*, 852 P.2d 1173, 1175 (Alaska 1993) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)).

[33] *State, Commercial Fisheries Entry Comm' n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003) (internal quotations omitted).

[34] We reject the landlords' contention that Swanner does not squarely control their free exercise claim because it failed to address or incorrectly decided various free exercise arguments that the landlords now emphasize.

1. First element of stare decisis: original error or current unsoundness

To meet the first essential element of the stare decisis test, the landlords bear the burden of convincingly demonstrating either that Swanner was originally erroneous or that intervening changes have made it unsound.[35]

a. The "originally erroneous" requirement

A decision is "originally erroneous" if it "proves to be unworkable in practice."[36] But the landlords here do not show that *Swanner* has proved unworkable in practice. They do suggest that *Swanner* left them with an unfair and unworkable moral dilemma by failing to meaningfully consider the right to free exercise of religion under *Smith*'s "hybrid" rights theory, by mistakenly finding that the challenged anti-discrimination laws--especially their built-in exceptions--are facially neutral and generally applicable, and by leaving intact the laws' vague and overbroad provisions restraining free speech. Yet to override the rule of stare decisis, the landlords need to show not just that *Swanner* failed to meaningfully address these points, but that they would clearly have prevailed if the points had been fully considered.

Here, no showing of clear and obvious error has been made. Despite the landlords' assertions to the contrary, *Swanner* did not ignore or overlook the "hybrid" rights exception to *Smith*'s general rule. Although *Swanner* found no need to discuss the theory, our observation in *Swanner* that no "hybrid" violation had been alleged demonstrates our recognition of the theory and our implicit view that it had no

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[35] *Carlson*, 65 P.3d at 859.

[36] *Pratt & Whitney*, 852 P.2d at 1176 (citing *Casey*, 505 U.S. at 854, 112 S.Ct. 2791).

clear and obvious application to the matter at issue.[37] The landlords' current arguments on this theory fall well short of convincing us that *Swanner* clearly would have been decided differently had the theory been raised. To the contrary, the landlords' current "hybrid" rights arguments convincingly illustrate that this constitutional theory remains controversial and largely undefined: considerable uncertainty continues to surround the doctrine's meaning, scope, and correct application--and, indeed, its very existence.[38] Hence, although

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[37] 874 P.2d at 280.

[38] *See, e.g., Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir.2003) (finding that both claims must individually have merit for heightened scrutiny to occur); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir.2003) (finding hybrid right may not exist, and if it does, it does not warrant strict scrutiny); *Miller v. Reed*, 176 F.3d 1202 (9th Cir.1999) (finding hybrid right can exist but claims must be violation of fundamental rights); *Reich v. Shiloh True Light Church of Christ, No. 95-2765*, 1996 WL 228802, ----3 (4th Cir. May 7, 1996) (per curiam) (finding hybrid right exists but free exercise claim fails compelling interest test); *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C.Cir.1996) (finding existence of hybrid right claim, but deciding case on other grounds); *Thiry v. Carlson*, 78 F.3d 1491 (10th Cir.1996) (finding hybrid right claim to exist but that claim at issue was not such a claim); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir.1995) (finding a hybrid claim warrants strict scrutiny but did not apply); *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir.1993) (refusing to decide hybrid right claims without clarification from Supreme Court); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir.1991) (finding hybrid right can exist); *Salvation Army v. N.J. Dep't of Cmty. Affairs*, 919 F.2d 183 (3d Cir.1990) (finding freedom of association is derivative of free exercise right and rejecting hybrid claim); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D.Tex.1997) (finding hybrid right exists); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443 (Ind.2001) (acknowledging hybrid right claim but remanding for further findings); *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn.1992) (finding hybrid right claim exists and compelling interest analysis would apply); *Health Serv. Div. v. Temple Baptist Church*, 112

the landlords' hybrid rights arguments certainly raise difficult and debatable constitutional questions, they fail to convincingly show that our holding in Swanner was clearly in error.[39]

The landlords fare no better in criticizing *Swanner*'s view that the challenged laws were facially neutral and generally applicable[40] – a view that potentially affects the analysis of free exercise rights under both the Smith test and the test set out in *Sherbert*.[41] As already mentioned above, the superior court's decision in the present case expressly found the landlords' contentions on this point to be lacking in merit. But even assuming that the landlords raised a fairly debatable issue on the neutrality and general applicability of the challenged laws, their arguments would still fail to make a clearly convincing showing that *Swanner* wrongly decided the issue.

N.M. 262, 814 P.2d 130 (App.1991) (acknowledging hybrid rights language but did not apply to facts of the case); *N.Y. State Emp. Rel. Bd. v. Christ the King Reg'l High Sch.*, 90 N.Y.2d 244, 660 N.Y.S.2d 359, 682 N.E.2d 960 (1997) (acknowledging hybrid rights language, but finding it inapplicable); *First United Methodist Church of Seattle v. Hearing Examiner for Seattle Landmarks Pres. Bd.*, 129 Wash.2d 238, 916 P.2d 374 (1996) (finding hybrid right claim for free exercise and free speech).

[39] *Cf. Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1150-51 (9th Cir.2000) (en banc) (Kleinfeld, J., dissenting) (describing the landlords' federal "hybrid" rights claim as raising "a serious question" falling "somewhere in between" two hypothetical cases in which the results of the *Smith* test would seem clear).

[40] *Swanner* determined that these laws applied equally to all people involved in renting and selling property, and did not expressly or implicitly disfavor religious groups. *Swanner*, 874 P.2d at 280.

[41] *See generally City of Boerne v. P.F. Flores*, 521 U.S. 507, 514, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

The landlords' arguments rely largely on the state statute's exception for "singles only" and "married couples only" classes of housing. The superior court found no evidence that this exception had any discriminatory intent or impact. Despite their strenuous protests to the contrary, the landlords offer no persuasive reason to challenge the superior court's findings. Notably, both the legislative history of this exception and the state commission's interpretation of it in past litigation suggest that the legislature intended that the exception would allow landlords considerable latitude to designate particular units or blocks of apartments as "singles only" or "married couples only," provided that the landlords established these classifications before offering the properties for rental--thus eliminating the risk of discriminating against prospective tenants on a case-by-case basis.[42] The landlords do not assert that their religious beliefs compel them to rent to classes of tenants other than "singles only" or "married couples"; nor do they satisfactorily explain why they could not take advantage of this exception to mitigate any financial hardship they might otherwise experience by complying with the anti-discrimination provision.

The landlords further suggest that *Swanner* should be deemed to have been wrongly decided because the statutory scheme it approved inevitably exposes them, and other similarly situated religious landlords, to intolerable restraints on their constitutional rights to free speech. But the superior court persuasively answered this contention by strictly construing the

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[42] See Brief of Amicus Curiae Alaska State Commission For Human Rights, *Foreman v. Anchorage Equal Rights Comm'n*, S-2677/S-2716 at 7-19 (July 28, 1988); *cf. Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1203 (Alaska 1989) (noting that AS 18.80.240(2) "permits an owner to rent housing for 'singles' or 'married couples' only" but does not apply to landlord who "rented to all classes of persons" and "did not purport to rent only to single people, or only to married people").

challenged laws to extend only to narrow "limitations on commercial speech" of the kind that is integral to "activities undertaken as preliminaries to real estate transactions." The superior court's narrow construction of the statutes comports with their underlying purpose and defeats the landlords' vagueness and overbreadth claims.[43]

b. The "intervening changes" requirement

As an alternative to demonstrating that Swanner was wrong when it was originally decided, the landlords could meet their burden of establishing the first element needed to overcome the rule of stare decisis by making a clear and convincing showing that the decision is no longer sound because conditions have changed.[44] But the landlords' claims reveal few salient factual changes: the landlords' situation is nearly indistinguishable from the one we considered in *Swanner*.

The landlords nonetheless allege that their current situation differs markedly from Swanner because the law has now changed. As we have previously recognized,

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[43] Indeed, in reply to the state commission's argument that restrictions like these are permissible under the Supreme Court's decision in Pittsburgh Press Co. v. Pittsburgh Comm' n on Human Relations, 413 U.S. 376, 389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) (any First Amendment interest otherwise arguably served by advertising commercial proposal is altogether absent when restriction on advertising is incidental to valid limitation of commercial activity itself), the landlords concede that their free speech claim completely depends on the validity of their free exercise claim: "The Landlords agree that if the government may constitutionally prohibit and legally sanction their religiously based refusal to rent to unmarried cohabitators, then their desired speech is illegal, and Pittsburgh Press controls."

[44] *Pratt & Whitney*, 852 P.2d at 1176.

> a prior decision may be abandoned because of "changed conditions" if "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [or] facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application. . . ."[45]

The landlords claim here that Swanner has recently been overruled by the Supreme Court's decision in *Boy Scouts of America v. Dale*.[46] Though they acknowledge that *Dale* dealt with associational freedom, not free exercise of religion, and so does not directly overrule *Swanner*, the landlords insist that "*Swanner* has been overruled sub silentio by Dale." In the landlords' view, *Dale* stands for the general proposition that anti-discrimination laws like those challenged here must fail when placed in opposition to "a serious fundamental First Amendment right."

But it seems reasonable to wonder whether "sub silentio" rulings--in other words, rulings that inform existing law by mere force of analogy--can ever trump stare decisis by establishing "changed conditions" that "have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[47] And more to the point, the landlords' reading of *Dale* overstates the opinion's holding. For the Supreme Court in *Dale* did not broadly rule, as the landlords

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[45] *Id.* at 1176 (quoting *Casey*, 505 U.S. at 833, 112 S.Ct. 2791).

[46] 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). The landlords also assert the Court's decision in Dale was foreshadowed by its ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

[47] *Pratt & Whitney*, 852 P.2d at 1176 (quoting *Casey*, 505 U.S. at 833, 112 S.Ct. 2791).

suggest, that First Amendment rights should generally be deemed more compelling than laws barring marital discrimination; instead, the Court expressly found New Jersey's claim of compelling interest attenuated in the particular situation at issue there because New Jersey law extended its anti-discrimination requirements to private groups whose activities fell well beyond those usually involved in providing public accommodations.[48] This same observation obviously would not hold true in the circumstances at issue here, since the challenged Alaska and Anchorage laws deal exclusively with the core activity of providing public accommodations. It follows that *Dale* does not clearly and convincingly undermine *Swanner*'s continuing soundness.

2. Second element of stare decisis: "more good than harm" requirement

The landlords' failure to convincingly demonstrate *Swanner*'s original or current unsoundness makes the second requirement for overriding the stare decisis rule academic. But it seems worthwhile to emphasize that even if the landlords could establish good reasons to suppose that *Swanner* was wrongly decided or is currently unsound, we would not override the doctrine of stare decisis unless they also clearly established that "more good than harm would result" from overruling that decision.[49] In our view, the potential benefits of overruling *Swanner* have not been clearly established here. The Ninth Circuit's en banc decision in this case sheds useful light on this point. That decision aptly summarized the serious disadvantages of attempting to resolve the difficult

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[48] 530 U.S. at 646-50, 120 S.Ct. 2446.

[49] *Carlson*, 65 P.3d at 859 (internal quotations omitted).

constitutional issues raised by the landlords without having a particularized controversy and a solid framework of facts:

> The manner in which the intersection of marital status discrimination and the First Amendment is presented here, devoid of any specific factual context, renders this case unfit for judicial resolution. The record before us is remarkably thin and sketchy, consisting only of a few conclusory affidavits. "A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate." And yet, the landlords ask us to declare Alaska laws unconstitutional, in the absence of any identifiable tenants and with no concrete factual scenario that demonstrates how the laws, as applied, infringe their constitutional rights. This case is a classic one for invoking the maxim that we do not decide " 'constitutional questions in a vacuum.' "
>
> . . . .
>
> Moreover, by being forced to defend the housing laws in a vacuum and in the absence of any particular victims of discrimination, the State and the City would suffer hardship were we to adjudicate this case now.[50]

Of course we recognize that the federal court discussed these prudential concerns in connection with the threshold issue of ripeness for judicial review--a separate procedural matter that we have resolved in the landlords' favor. Yet the federal court's concerns seem equally relevant to our stare decisis analysis, since they weigh heavily against any hasty assumption

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[50] *Thomas*, 220 F.3d at 1141-42 (citations omitted).

that we would do more good than harm by attempting to reconsider *Swanner* in this case as it currently stands. To the extent that they are relevant to our stare decisis analysis, then, the federal court's well-founded concerns deserve to be heeded, even though Alaska's lenient rule of standing has led us to disagree with the federal court's decision on ripeness. After all, we can see no good reason to hold that the landlords' undeniable right to pursue their claims in Alaska's courts should lighten the usual burden that any litigant must bear to overcome the force of precedent under stare decisis.

IV. CONCLUSION

Although the landlords have standing to pursue their claims in Alaska's courts, they have failed to show conditions warranting departure from the doctrine of stare decisis. Because we conclude that *Swanner* completely controls the landlords free exercise claims and that their free speech arguments lack independent merit, we AFFIRM the superior court's summary judgment order dismissing the landlords' complaint.

APPENDIX B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Case No. 3AN-01-07003 CI

KEVIN THOMAS, JOYCE BAKER, and JEFFREY BUBNA,

Plaintiffs,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION; the MUNICIPALITY OF ANCHORAGE; and PAULA HALEY in her official capacity as the executive director of the Alaska State Commission for Human Rights,

Defendants.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs in this case, Kevin Thomas, Joyce Baker, and Thomas [sic] Bubna, each own residential real estate in Anchorage that is regularly rented to tenants. The plaintiffs describe themselves as devoted members of the Christian faith. The plaintiffs "are committed to carrying out their religious faith in all aspects of their lives, including their commercial activities as landlords. Central to their faith is a belief that cohabitation between an unmarried man and an unmarried woman is a sin. The landlords also believe that facilitating the cohabitation of an unmarried couple is tantamount to committing a sin themselves." *Thomas v. Anchorage Equal Rights Comm'n*. 220 F.3d 1134, 1137 (9th Cir. 2000).

In this suit, plaintiffs challenge provisions of state law and the Anchorage Municipal Code that make it unlawful "to refuse to sell, lease or rent . . . real property to a person because of marital status". AS 18.80.240(1), (2), AMC 5.20.020. In addition, plaintiffs challenge the laws' restriction on certain speech by landlords, including inquiries into the marital status of prospective tenants.[1]

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[1] AS 18.80.240 provides in relevant part:

> It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property
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> . . .
>
> (3) to make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to buy, lease, or rent real property;
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> . . .
>
> (5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status . . . of that person or of any person associated with that person;

Anchorage Municipal Code section 5.20.020 contains similar language, but the code creates an exception for circumstances in which the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person. The language of the municipal code also differs significantly from that of the state law by including marital status within the set of protected characteristics with regard to advertising rental property. Specifically, AMC 5.20.020(G) provides:

> it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to . . . [c]irculate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement, or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex color, national origin, *marital status* or physical or mental disability. This shall not be construed to apply to publishing companies which accept advertising in the normal course of business.

(Emphasis added); *compare* AS 18.80.240(7).

The plaintiffs assert four causes of action in this case. First, the plaintiffs claim that the challenged laws have unconstitutionally burdened plaintiffs' hybrid constitutional rights, including their rights to the free exercise of religion protected by the First Amendment to the United States Constitution. Second, the plaintiffs assert that the Alaska Supreme Court's decision in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994), should be overruled. Third, the plaintiffs claim that the challenged laws violate their rights to free speech under the First Amendment to the United States Constitution and Article 1, Section 5 of the Alaska Constitution. Fourth, the plaintiffs claim that the challenged laws violate their rights to equal protection under the Fourteenth Amendment of the United States Constitution and Article 1, Section 1 of the Alaska Constitution. The plaintiffs seek an order overruling *Swanner*, a declaration that enforcement of AS 18.80.240 and AMC 5.20.020 is unconstitutional, and an order enjoining the defendants from enforcing those laws against religiously motivated landlords. The parties have filed cross-motions for summary judgment.

Second cause of action

In *Swanner*, a landlord refused to rent to unmarried roommates of the opposite sex because of his religious beliefs and was found by the Anchorage Equal Rights Commission to have violated AMC 5.20.020 and AS 18.80.240. 874 P.2d at 276-77. Plaintiffs in this action note that Mr. Swanner was "a landlord virtually identical" to the plaintiffs in this litigation. 1st Amended Complaint at ¶ 27. On appeal, Swanner argued that enforcement of those laws had a coercive effect on his free exercise of religion. 874 P.2d at 279. The Alaska Supreme Court rejected that claim and held that enforcement of the prohibition on discrimination set forth in AMC 5.20.020 and AS 18.80.240 did not violate Swanner's rights to the free

exercise of religion under either the United States Constitution or the Alaska Constitution. 874 P.2d at 279-84.

The plaintiffs have urged this court to overrule *Swanner* on grounds that *Swanner* misapplied federal law. The United States Supreme Court denied a petition for certiorari in *Swanner* and *Swanner* remains controlling law in this state. This court lacks authority to overrule decisions of the Alaska Supreme Court. This court reiterates its ruling at oral argument that the defendants are therefore entitled to summary judgment on the plaintiffs' second cause of action before this court.

First cause of action

Plaintiffs' first cause of action asserts that the challenged laws impermissibly infringe on several of their constitutional rights. Plaintiffs assert that the challenged anti-discrimination laws are not generally applicable and are not neutral as to religion. But the Alaska Supreme Court expressly and unequivocally rejected those precise arguments with regard to the exact same laws in *Swanner*. 874 P.2d at 280.

In *Swanner*, the Alaska Supreme Court noted that an individual might be exempt from a neutral law of general applicability if the law infringed not only on the right to free exercise of religion, but also on one or more additional constitutionally protected rights. 874 P 2d at 280. The supreme court observed that Swanner did not claim infringement of any right other than his right to free exercise of religion and so was not entitled to a possible exemption from the laws' requirements on that basis. 874 P.2d at 280 (citing *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 881-82 (1990)). Here, the landlords are asserting that these exact same laws unduly burden not only their right to free exercise of religion but also their constitutional rights to free speech, property ownership, occupational liberty, and equal protection. In such circumstances, plaintiffs assert that strict

scrutiny is required and the government must justify the legislation as furthering compelling governmental interests. But in *Swanner* the Alaska Supreme Court ruled that compelling state interests support the prohibition of marital status discrimination. 874 P.2d at 280 n.9 ("we hold . . . that compelling state interests support the prohibition on marital status discrimination"). Thus, even assuming that AMC 5.20.020 and AS 18.80.240 burden hybrid rights and accepting the plaintiffs' argument that the laws must therefore further compelling state interests, the defendants are entitled to summary judgment on the plaintiffs' first cause of action because this court is bound by the Alaska Supreme Court's ruling in *Swanner* that these laws do further compelling state interests.

Third cause of action

The plaintiffs also assert that the challenged laws burden their rights to free speech under the First Amendment to the United States Constitution and Article 1, Section 5 of the Alaska Constitution. They assert that the laws are impermissibly vague and over broad and that the laws infringe and chill religiously motivated speech. The plaintiffs seek summary judgment on their claim that speech restrictions in both laws violate their rights to free speech under the First Amendment to the United States Constitution.

Although the plaintiffs have not offered documentary evidence on this point, they assert that the Anchorage Daily News has declined to print real estate advertisements with statements about their religiously based preferences. The plaintiffs also assert that they are presently prohibited from displaying signs or publishing any communications expressing a religiously based preference regarding renting property based on marital status, but they have not provided details of the statements they would make if the challenged restrictions were

lifted. The plaintiffs assert that typically one unmarried couple views an apartment each time there is a vacancy and that they take steps to determine the marital status of prospective tenants despite the prohibitions of the challenged laws. The plaintiffs assert that their speech is not abstract in that each time they speak to prospective tenants they must violate the law to ask religiously motivated questions about marital status or express their religiously based preference for renting to married couples. In the court's view, the plaintiffs have standing and their claims are sufficiently ripe to permit a ruling on the summary judgment motions now before this court.

Alaska Statute 18.80.240(5) as it relates to speech merely precludes making certain false representations with respect to the availability of property. Commercial speech that is misleading is not protected by the First Amendment. *Thompson v. Western States Med. Center*, __ U.S. __, 122 S.Ct. 1497, 1504 (2002) (citing *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). The prohibition of false representations with respect to the availability of real estate is clear and specific and does not infringe protected speech rights.

Alaska Statute 18.80.240(3) precludes making an inquiry or record of the marital status of a person seeking to buy, lease, or rent real property. That prohibition closely correlates with the state's transactional interest in preventing acts of discrimination based on irrelevant interests. *Swanner*, 874 P.2d at 282. The prohibition is narrow in that it prevents a single question from being asked of individuals with an interest in property that is on the market. The speech proscribed by AS 18.80.240(3) can best be described as commercial and the prohibitions are narrow enough to satisfy constitutional scrutiny applicable to limitations on commercial speech. The same can be said of AMC 5.20.020(C) and (E) which contain language identical to AS 18.80.240.

A closer question is presented by AMC 5.20.020(G), which prohibits making communications that "indicate[ ] any preference, limitation, specification or discrimination" based on marital status. The plaintiffs offer four examples that they assert demonstrate that AMC 5.20.020(G) is overbroad. The plaintiffs contend that the statute precludes landlords from informing tenants that they believe for religious reasons that they should not rent to married couples, precludes landlords from informing their clergy that they prefer not to rent to married couples, precludes them from making such statements to lawmakers, and precludes display of signs containing certain quotations.

The plaintiffs' reading of the statute rests on an unduly narrow reading of limiting language in AMC 5.20.020(G) that specifies that the prohibition applies only to communications "with respect to the use, sale, lease, or rental of real property." Read in the context of AMC 5.20.020 as a whole, which relates to activities undertaken as preliminaries to real estate transactions, that limitation confines the scope of what might otherwise be an overbroad prohibition. In the court's view, the communications to clergy and lawmakers generally described in the plaintiffs' motion for summary judgment are not communications "with respect to the use, sale, lease, or rental of real property" as that phrase is used in the municipal code. To the extent that making statements to prospective tenants or posting of signs as described in the plaintiffs' motion are precluded as communications "with respect to the use, sale, lease or rental of real property," such limitations on commercial speech would be justified by the municipality's transactional interest in preventing individual acts of discrimination in the real estate market based on "irrelevant characteristics." *Swanner*, 874 P.2d at 282.

For the foregoing reason, the defendants are entitled to summary judgment on the plaintiff's third cause of action.

Fourth cause of action

The plaintiffs contend that the challenged laws discriminate against religiously motivated landlords and thus violate their rights to equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, Section 1 of the Alaska Constitution. Their argument hinges on two exceptions in the challenged laws. First, AS 18.80.240(1) and (2) expressly state that "nothing in [those] paragraph[s] prohibits the sale, lease, or rental of classes of real property commonly known as housing for 'singles' or 'married couples' only". Second, the prohibitions of AMC 5.20.020 do not apply "in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person." The plaintiffs claim that their rights to equal protection are violated because those exceptions permit discrimination for secular reasons while forbidding landlords from excluding unmarried cohabitants for religious reasons.

But the laws do not permit or forbid discrimination depending on the underlying reason for the landlord's desire to discriminate. Instead, AMC 5.20.020 permits discrimination, regardless of whether the motivation is religious or secular, "in the individual home wherein renter or lessee would share common living areas with the owner . . .". And AS 18.80.240(1) and (2) permit any landlord to discriminate on the basis of tenants' marital status in a comprehensive way by exempting an entire class of property commonly known as being exclusively for single people or exclusively for married couples. What the state law does not permit is particularized discrimination against prospective tenants on a case-by-case basis. Forbidding individualized discrimination while allowing landlords to designate properties as "married couples only" or "single persons only" for either religious or secular reasons does not facially discriminate against religiously motivated landlords.

The plaintiff's arguments in this case might be construed as a claim that the challenged laws have a disparate impact on religiously motivated landlords. As there is no disparate impact cause of action under the United States Constitution, the court evaluates such a claim within the framework of the three-step sliding scale analysis applicable to equal protection claims under the Alaska Constitution:

> Under this test, we initially establish the nature of the right allegedly infringed by state action, increasing the state's burden to justify the action as the right it affects grows more fundamental: at the low end of the sliding scale the state needs only to show that it has a legitimate purpose; but at the high end–when its action directly infringes a fundamental right–the state must prove a compelling governmental interest. We next examine the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard. We last consider the particular means that the state selects to further its purpose; a showing of substantial relationship between means and ends will suffice at the low end of the scale, but at the high end the state must demonstrate that no less restrictive alternative exists to accomplish its purpose.

State v. Planned Parenthood of Alaska, 35 P.3d 30, 42 (Alaska 2001) (citations omitted). It has already been established as a matter of law that compelling state interests support the prohibition of marital status discrimination in the commercial activity of renting residential real estate. *See Swanner*, 874 P.2d at 280 n.9. The plaintiffs in this case have not offered any evidence suggesting that those governmental interests could be furthered by means more closely tailored to avoid infringement of the plaintiffs' asserted interests in excluding unmarried cohabitants from their rental property. Indeed, when moving for

summary judgment on their equal protection claims the plaintiffs did not submit any additional evidence or affidavits. *Compare Planned Parenthood*, 35 P.3d at 46 (conflicting evidence necessitated hearing).

On the record before this court, defendants are entitled to summary judgment on the plaintiffs' fourth cause of action.

Conclusion

Summary judgment is hereby granted to the defendants as to each of the plaintiffs' four causes of action.

Entered at Anchorage, Alaska this 8th day of August 2002.

/s/ Sharon Gleason
Sharon L. Gleason
Superior Court Judge

[certificate of service omitted in printing]

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

No. S-5362.

Tom SWANNER,
d/b/a Whitehall Properties,

Appellant,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION,
Paul L. Connerty, Executive Director, ex rel. Joseph Bowles,
William F. Harper, and Dee Moose,

Appellees.

May 13, 1994.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS and COMPTON, JJ.

On consideration of the petition for rehearing, filed on February 25, 1994, and the response, filed on March 14, 1994,

IT IS ORDERED:

1. The petition for rehearing is GRANTED.
2. The majority opinion, Opinion No. 4049, published on February 11, 1994, is WITHDRAWN.
3. Opinion No. 4081 is issued on this date in its place.
4. The major modifications in the opinion follow:

Editor's Note: Modifications incorporated for purposes of publication.

(c) The modified majority opinion on rehearing will be issued as a Per Curiam opinion since former Justice Burke did not participate in the court's consideration of the petition for rehearing.

Entered by direction of the Court at Anchorage, Alaska, on May 13, 1994.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS and COMPTON, JJ.

OPINION

PER CURIAM.

Swanner, d/b/a Whitehall Properties, appealed the superior court's decision which affirmed the Anchorage Equal Rights Commission's (AERC) order that Swanner's policy against renting to unmarried couples constituted unlawful discrimination based on marital status. Swanner disputes the decision and contends that enforcing the applicable statute and municipal ordinance violates his constitutional right to free exercise of his religion under the United States and Alaska Constitutions. Swanner claims the AERC deprived him of due process by adopting the hearing examiner's recommended decision and proposed order without itself conducting an independent review of the case on its merits and by failing to notify him that it would do so.

We hold that Swanner discriminated against the potential tenants based on their marital status. We further hold that enforcing the fair housing laws does not deprive him of his right to free exercise of his religion. The proceedings of the AERC did not deprive Swanner of his right to due process of law. We affirm the AERC and superior court decisions.

I. FACTS AND PROCEEDINGS BELOW

Joseph Bowles, William F. Harper, and Dee Moose filed three separate complaints of marital status discrimination in the rental of real property in Anchorage. The complainants alleged that Tom Swanner, doing business as Whitehall Properties, violated municipal and state anti-discrimination laws, Anchorage Municipal Code (AMC) 5.20.020 and AS 18.80.240. Swanner refused to rent or allow inspection of residential properties after learning that each complainant intended to live with a member of the opposite sex to whom he or she was not married.

While Swanner did not specifically recall having conversations with Bowles, Harper, or Moose, he readily admitted having a policy of refusing to rent to any unmarried couple who intend to live together on the property. Swanner's refusal to rent or show property to unmarried couples is based on his Christian religious beliefs. Under Swanner's religious beliefs, even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful because such an arrangement suggests the appearance of immorality. It is undisputed that Swanner rejected each complainant as a tenant because of this policy and for no other reason.

A. Proceedings Before the Anchorage Equal Rights Commission

The AERC consolidated the three cases for hearing and appointed Robert W. Landau as hearing examiner on April 6, 1990. Landau conducted a hearing on October 9 and 11, 1990 and issued a twenty-five page Recommended Decision and proposed order in favor of the complainants on January 7, 1991. He served the recommended decision to Swanner's counsel and the AERC on January 7, 1991.

Pursuant to the AERC's administrative rules of procedure in effect at the time, each party had ten days after receipt of the recommended decision to submit written objections. AMC 5.10.015(A). When the AERC receives objections, the regulations provide for its review of the record and modification of the recommended decision where appropriate. AMC 5.10.015(B). If the parties fail to object, the proposed decision automatically becomes final. AMC 5.10.015(A). Neither Swanner nor the AERC submitted written objections. On January 23, 1991, the AERC issued a memorandum stating that, pursuant to AMC 5.10.015(A), the parties' failure to object to the hearing examiner's recommended decision resulted in his proposed order becoming final on January 22, 1991. On January 31, 1991, Cheri C. Jacobus, AERC Chairperson, issued a Notice of Final Order which affirmed that the proposed order became final on January 22, 1991.

B. Proceedings Before the Superior Court

Swanner appealed to the superior court on March 8, 1991 Judge Karen L. Hunt heard oral argument on May 15, 1992 and issued a written decision and order on August 31, 1992 She affirmed the AERC's decision, holding that (a) Swanner's conduct constituted unlawful discrimination based upon marital status; (b) enforcement of the state and municipal anti-discrimination laws does not violate Swanner's constitutional rights, pursuant to the U.S. Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and our decisions in *Frank v. State*, 604 P.2d 1068 (Alaska 1979) and *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293 (Alaska 1982); and (c) the automatic finalization of the AERC's decision did not violate Swanner's due process rights.

C. Proceedings Before This Court

Swanner appealed to this court on September 18, 1992. He contends that the superior court erred in finding that he discriminated against the complainants on the basis of marital status. He claims that he does not discriminate based on marital status, but even if he does, he is excused from compliance with the anti-discrimination laws because of his fundamental right to the free exercise of his religion, guaranteed by the Alaska and United States Constitutions. He also claims that the automatic finalization of the AERC's decision violates his due process rights under the Alaska and United States Constitutions.[1]

II. DISCUSSION

A. Swanner Violated AMC 5.20.020 and AS 18.80.240 by Discriminating Based on Marital Status

Swanner argues that he does not discriminate against individuals based on their marital status because he will rent to people who are single, married, widowed, divorced, or separated. However, he will not rent to those whom he expects will engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage. Swanner considers such cohabitation to be fornication and immoral.

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[1] Each issue involves the interpretation and construction of laws and regulations. On questions of law arising on appeal which do not involve particularized agency expertise, this court applies its independent judgment. *Kodiak Island Borough v. State of Alaska, Dep't of Labor*, 853 P.2d 1111, 1113 (Alaska 1993); *Alaska Transp. Comm'n v. Airpac, Inc.*, 685 P.2d 1248, 1252 (Alaska 1984). Thus, as the superior court found and both parties agree, the substitution of judgment standard is the appropriate standard of review on the issues Swanner has raised.

The AERC responds that the laws at issue do not recognize a distinction between "marital status" and "cohabitation." The AERC claims the statutes' plain language demonstrates that "marital status" includes cohabitating couples.

In *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201-03 (Alaska 1989), we looked at the plain language of AS 18.80.240[2] and AMC 5.20.020[3] and reviewed the intent

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[2] Alaska Statute 18.80.240 states:

Unlawful practices in the sale or rental of real property. It is unlawful . . .

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status,

. . ..

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status . . . of a person seeking to buy, lease or rent real property;

. . ..

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the . . . marital status, change in marital status . . . of that person. . ..

[3] AMC 5.20.020 provides:

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful . . .

A. To refuse to . . . rent the real property to a person because of . . . marital status . . .;

. . . . .

C. To make a written or oral inquiry or record of the . . . marital status . . . of a person seeking to . . . rent real property;

. . . . .

E. To represent to a person that real property is not available for

behind the anti-discrimination laws. In *Foreman*, a landlord who refused to rent to an unmarried couple argued that the laws did not protect the interests of unmarried couples. Id. at 1201. We held that the landlord's policy against renting to unmarried couples unlawfully discriminated on the basis of marital status. Id. at 1203. We reasoned that because the landlord would have rented to the prospective tenants had they been married, and he refused to rent the property only after learning the couple was not married, "[t]his constitutes unlawful discrimination based on marital status." Id. The same reasoning applies here. Because Swanner would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.[4]

The definition of "cohabit" demonstrates that marital status and conduct are inextricably combined. "Cohabit" means "to live together in a sexual relationship when not legally married." The American Heritage Dictionary 259 (1980). Swanner cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion. The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the

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> inspection . . . [or] rental . . . when in fact it is available, or to refuse a person the right to inspect real property, because of the . . . marital status . . . of that person . . .;

[4] Swanner agrees that the laws at issue forbid discrimination on the basis of marital status. However, he contends that he did not discriminate against anyone on the basis of his or her marital status. Instead, he asserts that he discriminates on the basis of conduct, which is not prohibited by the statutes.

prospective tenants based on their conduct and not their marital status is without merit.

B. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the United States Constitution

Swanner contends that enforcement of AMC 5.20.020 and AS 18.80.240 against him has a coercive effect on the free exercise of his religious beliefs. He believes that compliance with these laws forces him to choose between his religious beliefs and his livelihood. He requests that we accommodate his religious beliefs by creating an exemption to the statute and ordinance. The AERC responds that "it is not Swanner's religious beliefs per se which run afoul of our anti-discrimination laws, but rather his actions and conduct in a commercial setting."

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I. The Free Exercise Clause applies to the states by its incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). It grants absolute protection to freedom of belief and profession of faith, but only limited protection to conduct dictated by religious belief. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (narrowing the scope of religious exemptions under the Free Exercise Clause by upholding a statute that criminalized peyote use, as applied to Native American religious ceremonies).

Swanner claims that we should apply the "compelling state interest" test set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), to determine whether the laws at issue violate his right to free exercise of religion under the United States Constitution.[5] However, in *Smith*, the United States Supreme Court expressly rejected applying the Sherbert test where the law being challenged is generally applicable, or, in other words, where the law is not directed at any particular religious practice or observance.[6] *Smith*, 494 U.S. at 885, 110 S.Ct. at 1603. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, ----, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993) (citing *Smith*, 494 U.S.

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[5] Under this balancing test, a law that incidentally burdens a religious practice must be justified by a compelling governmental interest. *See Sherbert*, 374 U.S. at 403, 406, 83 S.Ct. at 1793-94, 1795.

[6] The Court stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"--permitting him, by virtue of his beliefs, "to become a law unto himself,"--contradicts both constitutional tradition and common sense.

494 U.S. at 885, 110 S.Ct. at 1603 (citations and footnote omitted).

872, 110 S.Ct. 1595 (1990)).[7] "Neutrality and general applicability are interrelated. . .. [F]ailure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id. at ----, 113 S.Ct. at 2226.

The first step in determining whether a law is neutral is whether it discriminates on its face. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." Id. at ----, 113 S.Ct. at 2227. Neither the ordinance nor the statute contain any language singling out any religious group or practice.

Even when a law is facially neutral, however, it may not be neutral if it is crafted to impede particular religious conduct. Id. These laws clear that hurdle as well. The purpose of AMC 5.20.020 and AS 18.80.240 is to prohibit discrimination in the rental housing market.[8] Swanner does not claim that the

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[7] In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), the Court used the Free Exercise Clause to strike down city ordinances that regulated animal sacrifice, but effectively prohibited only sacrifice practices of the Santeria religion. The Court held the ordinances failed to satisfy the Smith requirements because they were not neutral, generally applicable, nor narrowly tailored, and did not advance compelling governmental interests.

[8] Alaska Statute 18.80.200 states the purpose of the anti-discrimination laws:

> (a) It is determined and declared as a matter of legislative finding that discrimination against an inhabitant of the state because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood is a matter of public concern and that this

purpose of the laws is to discriminate against people based on religion; in fact, he contends that the laws do not even cover this kind of discrimination. Therefore, the laws satisfy the requirement of neutrality.

Additionally, these laws are generally applicable. They apply to all people involved in renting or selling property, and do not specify or imply applicability to a particular religious group. Therefore, at least under the general rule, no compelling state interest is necessary.

Smith provides one ground for judicial exemptions from compliance with neutral laws of general applicability. A court may exempt an individual from a law where the facts present a hybrid situation where an additional constitutionally protected right is implicated. *Smith*, 494 U.S. at 881-82, 110 S.Ct. at 1601-02. Like the appellant in *Smith*, Swanner does not contend that the laws in question here infringe on any constitutional right other than his right to free exercise of religion. Consequently, this case does not present such a "hybrid" situation.

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discrimination not only threatens the rights and privileges of the inhabitants of the state but also menaces the institutions of the state and threatens peace, order, health, safety and general welfare of the state and its inhabitants.

(b) Therefore, it is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in employment, in credit and financing practices, in places of public accommodation, in housing accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, sex, age, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood.

We conclude that enforcing AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the United States Constitution.[9]

C. Enforcement of AMC 5.20.020 and AS 18.80.240 Does Not Violate Swanner's Constitutional Right to the Free Exercise of His Religion Under the Alaska Constitution

Swanner does not dispute that the ordinance and statute are generally applicable and neutral under Smith, but asserts that "this decision does not mandate use of a less restrictive standard by state courts in interpreting state constitutional protection."

Swanner is correct in asserting that a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution. *See*, e.g., *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969) ("We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution."). Thus, even though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the Smith test to religious

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[9] Shortly before the publication of this opinion, the United States Congress passed the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (1993). That act replaced the Smith test with the compelling interest test. Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative.

exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution. We will apply Frank v. State, 604 P.2d 1068 (Alaska 1979), to determine whether the anti-discrimination laws violate Swanner's right to free exercise under the Alaska Constitution.[10]

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[10] Swanner notes that two jurisdictions have held that a landlord may refuse to rent to unmarried couples because of his/her religious beliefs. He cites to decisions from Minnesota and California for the proposition that enforcement of the anti-discrimination laws against him violates his right to free exercise. In *Minnesota v. French*, 460 N.W.2d 2 (Minn.1990), the Minnesota Supreme Court held that a landlord's refusal to rent to an unmarried couple did not violate Minnesota's anti-discrimination laws and enforcing such laws would violate the landlord's free exercise right. However, in French, the anti-discrimination laws at issue did not define or otherwise explain the term "marital status." The court concluded that the Minnesota Legislature did not intend to include unmarried couples in the definition. Cf. *Foreman*, 779 P.2d at 1203 (holding unmarried couples are included within the state and municipal prohibitions against discrimination based on marital status). Moreover, the Minnesota court relied on the criminal anti-fornication statute then in effect. In contrast, Alaska's fornication provision was repealed well before the discriminatory conduct giving rise to this case occurred. Compare *French*, 460 N.W.2d at 10, with *Foreman*, 779 P.2d at 1202. Further, the French court relied on the Minnesota Constitution, article I, section 16, which contains very different language from the Alaska Constitution. *See French*, 460 N.W.2d at 9.

In *Donahue v. Fair Employment Housing Comm'm*, 2 Cal.Rptr.2d 32 (Cal.App.1991), review granted and opinion superseded, 5 Cal.Rptr.2d 781, 825 P.2d 766 (Cal.1992), review dismissed as improvidently granted and remanded, 23 Cal.Rptr.2d 591, 859 P.2d 671 (Cal.1993), the California Court of Appeal held that although the landlords' conduct did constitute prohibited marital status discrimination, the landlords were entitled to an exemption from the anti-discrimination laws because of their religious beliefs. The court based its decision "on independent state constitutional grounds." 2 Cal.Rptr.2d at 40. However, the California Supreme Court depublished the court of appeal's opinion, thereby rendering the decision uncitable.

In *Frank v. State*, we adopted the Sherbert test to determine whether the Free Exercise Clause of the Alaska Constitution requires an exemption to a facially neutral law.[11] 604 P.2d at 1070. We held that to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief. Id. at 1071 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533-34, 32 L.Ed.2d 15 (1972)). Once these three requirements are met, "[r]eligiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order,' or where there are competing governmental interests 'of the highest order and . . . [are] not otherwise served.. . .' " *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n. 33 (Alaska 1982) (quoting *Frank*, 604 P.2d at 1070).

Swanner clearly satisfies the first and third requirements to invoke an exception to the laws under the Free Exercise Clause. No one disputes that a religion is involved here (Christianity), or that Swanner is sincere in his religious belief that cohabitation is a sin and by renting to cohabitators, he is facilitating the sin. However, the superior court held that he did not meet the second requirement that his conduct was religiously based because "[n]othing in the record permits a finding that refusing to rent to cohabiting unmarried couples is a religious ritual, ceremony or practice deeply rooted in

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Neither case provides this court with meaningful guidance in interpreting the Free Exercise Clause of the Alaska Constitution.

[11] In *Seward Chapel, Inc. v. City of Seward*, this court held, "Our ruling in Frank establishes that there are situations in which the Alaska Constitution requires the state or a municipality to except from a facially neutral law persons whose religious beliefs dictate that they not comply with the law." 655 P.2d 1293, 1301 (Alaska 1982) (footnote omitted).

religious belief." Swanner's claim that the superior court misinterpreted *Frank v. State* as limiting free exercise rights only to ritual or ceremony has merit. In *Frank*, we determined that the action at issue was a practice deeply rooted in religion. 604 P.2d at 1072-73. However, we did not intend to limit free exercise rights only to actions rooted in religious rituals, ceremonies, or practices. To meet the second requirement, a party must demonstrate that the conduct in question is religiously based; this determination is not limited to actions resulting from religious rituals. Swanner's refusal to rent to unmarried couples is not without an arguable basis in some tenets of the diverse Christian faith, and therefore, his conduct is sufficiently religiously based to meet our constitutional test. Although Swanner meets the three preliminary requirements to invoke an exception to the anti-discrimination laws, the analysis does not end here.

As discussed previously, a religious exemption will not be granted if the religiously impelled action poses "some substantial threat to public safety, peace or order or where there are competing state interests of the highest order." *Frank*, 604 P.2d at 1070. The question is whether Swanner's conduct poses a threat to public safety, peace or order, or whether the governmental interest in abolishing improper discrimination in housing outweighs Swanner's interest in acting based on his religious beliefs.

In our view, the second part of the test adopted in *Frank* is applicable here. Under this part of the *Frank* test, we must determine whether "a competing state interest of the highest order exists." "The question is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice at issue." *Frank*, 604 P.2d at 1073. The government possesses two interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of

discrimination based on irrelevant characteristics. Most free exercise cases, including Frank, involve "derivative" state interests. In other words, the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect. This can be contrasted with a "transactional" interest in which the State objects to the specific desired activity itself.

For example, in *Frank*, this court exempted a Central Alaska Athabascan Indian needing moose meat for a funeral potlatch from state hunting regulations. The State did not object to killing moose per se (indeed, it expressly allows moose hunting in season); the State's derivative interest was in maintaining healthy moose populations. In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing.

We look to *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1943), as an analogy. In *Prince*, the United States Supreme Court refused to grant an exemption to child labor laws for children distributing religious literature. As in this case, the state had a transactional interest: preventing exploitation of children in employment. Thus, the state objected to child labor, the particular activity at issue, per se, not to an effect of that activity. The state legislature had prohibited children from working under certain conditions. Therefore, permitting any child to work under such conditions resulted in harming the government's transactional interest. This transactional government interest does not involve a

numerical cutoff below which the harm is insignificant unlike in Frank.

Similarly, in the instant case, the legislature and municipal assembly determined that housing discrimination based on irrelevant characteristics should be eliminated. *See Hotel, Motel, Restaurant, Etc. Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976) ("[T]he statutory scheme constitutes a mandate to the agency to seek out and eradicate discrimination in . . . the rental of real property."); *Loomis Electronic Protection, Inc. v. Schaefer*, 549 P.2d 1341, 1343 (Alaska 1976) (recognizing the Alaska Legislature's "strong statement of purpose in enacting AS 18.80, and its avowed determination to protect the civil rights of all Alaska citizens"); see also AS 18.80.200; AMC 5.10.010. The existence of this transactional interest distinguishes this case from Frank and most other free exercise cases where courts have granted exemptions. The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. Under Frank, this interest will clearly "suffer if an exemption is granted to accommodate the religious practice at issue."

The dissent attempts to prove that the state does not view marital status discrimination in housing as a pressing problem by pointing to other areas in which the state itself discriminates based on marital status. However, those areas are easily distinguished. The government's interest here is in specifically eliminating marital status discrimination in housing, rather than eliminating marital status discrimination in general. Therefore,

the other policies which allow marital status discrimination are irrelevant in determining whether the government's interest in eliminating marital status discrimination in housing is compelling.

In the examples the dissent cites, treating married couples differently from unmarried couples is arguably necessary to avoid fraudulent availment of benefits available only to spouses. The difficulty of discerning whose bonds are genuine and whose are not may justify requiring official certification of the bonds via a marriage document. That problem is not present in housing cases: as this case demonstrates, if anything, an unmarried couple who wish to live together are at a disadvantage if they claim to be romantically involved.

It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities. In *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261, 102 S.Ct. at 1057.

Swanner complains that applying the anti-discrimination laws to his business activities presents him with a "Hobson's choice"--to give up his economic livelihood or act in contradiction to his religious beliefs. A similar argument was advanced in *Seward Chapel*, where *Seward Chapel* argued that

applying the city zoning ordinances to prohibit construction of a parochial school impermissibly burdened the chapel's free exercise rights. 655 P.2d at 1299. We concluded that "there has been no showing of a religious belief which requires members of *Seward Chapel* to locate in [a specific place].. . . [T]he inconvenience and economic burden of which *Seward Chapel* now complains is caused largely by the choice to build in [a specific place] . . ." Id. at 1302 (footnote omitted).

Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or "Hobson's choice," of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices in the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. *See* AS 18.80.240; AMC 5.20.020. Voluntary commercial activity does not receive the same status accorded to directly religious activity. *Cf. Frank v. State*, 604 P.2d at 1075 (exempting an Athabascan Indian from state hunting regulations "to permit the observance of the ancient traditions of the Athabascans").

"As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi.L.Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples to not be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws. Therefore, we conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against

Swanner does not violate his right to free exercise of religion under the Alaska Constitution.

D. The AERC Did Not Deprive Swanner of Due Process of Law

1. AMCR 5.10.015(A) is Not an Unconstitutional Delegation by the AERC

Anchorage Municipal Code 5.10.040 authorizes the AERC: (a) to hold public hearings; (b) to administer oaths and issue subpoenas; (h) to delegate to its executive director all powers and duties except the power to hold hearings and issue orders; and (i) to adopt procedural and evidentiary rules necessary to fulfill the intent of Title 5. AMC 5.10.040. The AERC's power to "adopt procedural and evidentiary rules" is effectuated by promulgating municipal regulations.

Anchorage Municipal Code of Regulations (AMCR) provides the scope of the hearing examiner's recommendation.

> The hearing examiner . . . shall rule on the admissibility of evidence and other procedural matters. On any question which would be determinative of the jurisdiction of the commission or of the culpability of any party, the hearing examiner . . . may only make recommendations to the full commission. AMCR 5.10.013(C)(2).[12] Additionally, "[a]ll recommendations of the hearing

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[12] On February 16, 1993, the AERC repealed AMCR 5.10.013 and 5.10.015. *See* AMCR 5.60.003(F), 5.60.012(C), (D) for the new regulations replacing these sections.

We apply the regulations as they existed when Swanner's case began at the agency level.

> examiner . . . shall be consistent with commission decisions and regulations." AMCR 5.10.013(C)(4).

AMCR 5.10.015(A) states:

> After a party . . . receives the hearing examiner's . . . proposed findings of fact, conclusions of law and proposed order, that person or his/her representative may, within 10 days or such other time fixed by the chair, present written objections to the commission. If no party files an objection within ten days, the proposal shall become final.

Swanner claims that AMCR 5.10.015(A) directly conflicts with AMCR 5.10.013(C)(2) because "[Section] 5.10.015 appears to permit the commission to adopt the hearing examiner's recommendations without ever considering its content, rationale or rectitude." He interprets AMCR 5.10.013(C)(2) as authorizing only "the full commission" to determine a question which is determinative of jurisdiction or of the culpability of a party; Swanner asserts that his culpability in housing discrimination was at issue. He contends that the AERC abdicated its responsibility by adopting the hearing examiner's recommendation, and, therefore, the AERC violated AMCR 5.10.013.

Swanner is correct that the hearing examiner did not have the authority to determine Swanner's culpability. Instead he had the authority to make a recommendation, which is exactly what he did. Hearing Examiner Landau made a recommendation to the AERC and the AERC decided to adopt it. Therefore, no conflict exists between AMCR 5.10.013(C)(2) and AMCR 5.10.015(A), and the AERC followed its own

regulations in adopting the hearing examiner's recommendation.[13]

2. The Regulations Do Not Require an Independent Review by the AERC

Swanner finds fault with this process and complains that the AERC's regulations do not grant it authority to approve a hearing examiner's decision without conducting an independent review. No rule of procedure provides that the AERC must independently review the hearing examiner's recommendations. AMCR 15.10.015(B) expressly provides for the AERC's review of the hearing examiner's recommendations after a party timely files an objection. Swanner did not file an objection; therefore, the regulations required no independent review by the AERC.

3. Due Process Did Not Require That the AERC Personally Notify Swanner That It Would Adopt the Hearing Examiner's Recommendation Absent an Objection Within Ten Days

Swanner claims the AERC's adoption of the hearing examiner's recommendation violated his constitutional right to due process of law. Both the Alaska and United States Constitutions provide that a person shall not be deprived of "life, liberty, or property, without due process of law." Alaska Const., Art. 1, § 7; U.S. Const. amend. XIV, § 1. "Due process requires 'that deprivation of life, liberty or property by

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[13] Where an agency interprets its own regulations, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) (citing Kenneth C. Davis, Administrative Law Treatise § 7.22, at 105-08 (2d ed. 1979)).

adjudication be proceeded by notice . . . appropriate to the nature of the case.' " *Wickersham v. State Com. Fisheries Entry Comm'n*, 680 P.2d 1135, 1144 (Alaska 1984) (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950)). This court held "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Aguchak v. Montgomery Ward Co., Inc.*, 520 P.2d 1352, 1356 (Alaska 1974) (adopting *Mullane* language for analysis under the Alaska Constitution).

Swanner states that he did not receive notice that his failure to object to the hearing examiner's recommended decision would result in the AERC making the decision final. He claims that he became aware of the AERC's intent to approve the hearing examiner's recommended decision the day after objections to the proposed order were due, when the AERC issued a memorandum stating the proposed order became final. Therefore, he claims he was not given "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action, as required by Alaska law."

Swanner cannot claim that he was unaware of the pendency of this action. The actual hearing in this matter occurred on October 9 and 11, 1990, and Swanner participated in seven months of formal pre-hearing procedures and discovery. Swanner was clearly aware of the "pendency of this action." Moreover, AMCR 5.10.015 was readily available to Swanner and the public from both the AERC and the State Law Library. Accordingly, the AERC did not deny Swanner due process.

III. CONCLUSION

We hold that Swanner impermissibly discriminated against Bowles, Harper, and Moose because he would not rent to them based on their marital status. The Free Exercise Clause of the United States and Alaska Constitutions do not permit Swanner to disobey the state and municipal anti-discrimination laws by entitling him to an exemption. The AERC did not deny Swanner his right to due process by following its procedural regulations.

The AERC's final order and the superior court's opinion are AFFIRMED.

MOORE, C.J., dissents.

MOORE, Chief Justice, dissenting.

Article I, section 4 of the Alaska Constitution declares that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." As the majority correctly recognizes, this provision may provide greater protection of free exercise rights than is now provided under the United States Constitution. Opinion at 280-281. Accordingly, while the United States Supreme Court has adopted a new test to analyze free exercise claims such as *286 the one at issue here,[1] the majority agrees that we will continue to apply the compelling interest test in interpreting the free exercise clause of the Alaska Constitution. Opinion at 281.

Our decision in *Frank v. State*, 604 P.2d 1068 (Alaska 1979), sets forth the framework from which we must determine whether AMC 5.20.020 and AS 18.80.240 violate Swanner's right to the free exercise of his religion. As we stated in *Frank*, "[n]o value has a higher place in our constitutional system of government than that of religious freedom." 604 P.2d at 1070. For this reason, a facially neutral statute or ordinance which interferes with religious-based conduct must be justified by a compelling state interest. Id. Absent such an interest, our constitution requires an exemption from the laws at issue to accommodate religious practices. *Id.* at 1070-71.

The majority acknowledges that Swanner's actions fall within the ambit of the free exercise clause. Swanner has shown that his refusal to rent apartments to unmarried individuals who plan to live with a member of the opposite sex is based on his Christian faith, which strictly proscribes such

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[1] *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 884-90, 110 S.Ct. 1595, 1603-06, 108 L.Ed.2d 876 (1990).

cohabitation. No one questions the sincerity of his religious belief that he facilitates a sin by renting to unmarried individuals such as the complainants in this case. *See* Opinion at 281-282. For this reason, Swanner's religiously impelled conduct must be protected under Alaska law unless the AERC can show that the conduct poses "some substantial threat to public safety, peace or order," or that there exist competing governmental interests "of the highest order" which are not otherwise served without limiting Swanner's conduct. *Frank*, 604 P.2d at 1070 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963)); *Seward Chapel, Inc. v. City of Seward*, 655 P.2d 1293, 1301 n. 33 (Alaska 1982). I do not believe the AERC has met its burden in this case. I would therefore grant Swanner an exemption to accommodate his religious beliefs.

First, I note that in determining that the governmental interest in this case is "of the highest order," the majority announces an entirely new and unnecessary test examining the state's "transactional" and "derivative" interests. Opinion at 282. Under this analysis, the majority concludes that the state has a transactional, or per se, interest in preventing "individual acts of discrimination based on irrelevant characteristics" which overrides Swanner's free exercise rights in this case. Because the interest is "transactional," the majority concludes that no evidentiary basis is required to show that rental housing for unmarried couples has become scarce. However, before the court would enforce the state's "derivative" interest in "ensuring access to housing for everyone," the AERC apparently would have to make an evidentiary showing that cohabitating couples have experienced hardship in finding available housing, *i.e.*, that Swanner's conduct poses a "substantial threat to public safety, peace or order." *Frank*, 604 P.2d at 1070.

In my opinion, this amorphous analysis of the state's interests ultimately will prove to be useless in resolving future free exercise cases. Even in this case, I do not believe it provides a useful distinction of the interests at issue. For example, the majority determines that the state has a per se objection to marital status discrimination in housing which overcomes Swanner's free exercise rights. The majority defines this interest as that in "preventing acts of discrimination based on irrelevant characteristics." Opinion at 282. Such an articulation of the state's interest poses myriad questions. Who is to determine what is an "irrelevant" characteristic? Obviously, marital status is not "irrelevant" to Swanner. It is central to the question whether he will be committing a sin under the dictates of his religion. Is the legislative branch the final arbiter of relevancy or irrelevancy? Further, the discrimination at issue here is not based on innate "characteristics" but rather on the conduct of potential tenants. While this conduct is worthy of some protection, it does not warrant the same constitutional protection given to religiously compelled conduct. I am not willing to place the right to cohabitate on the same constitutional level as the right to freedom from discrimination based on either innate characteristics--such as race or gender--or constitutionally protected belief, such as freedom of religion.

In addition, it remains unclear to me how the state's "derivative" interests are to be identified. Here, that interest is defined with little explanation as being the state's interest in "providing access to housing for all." Opinion at 282. Does this mean the state has no per se objection to the fact that some individuals may have limited access to housing? In *Frank*, could it not be said that the state had a per se interest in enforcing its hunting regulations?

In *Frank*, this court set forth a workable and sufficient guide to determine whether a governmental interest is sufficiently compelling to overcome an individual's free exercise rights. 604 P.2d at 1070. It seems to me that the majority's effort to expand this analysis adds little to the actual analysis of interests at stake. To the contrary, I see the majority's expansion of Frank as little more than a strained effort to distinguish Frank from the present situation when such a distinction is not logically justified. In this effort, the majority totally ignores the record in this case, and it engages in a game where the "transactional" or "derivative" label attached to any given state interest predetermines the outcome of the case.

There is no governmental interest "of the highest order" to justify the burden on Swanner's fundamental rights.

Even applying the framework announced by the court in analyzing whether the state's interest is "of the highest order," I cannot agree with the court's reasoning and resulting decision. In essence, the majority's conclusion is that marital status discrimination constitutes such an affront to human dignity that the state has a per se obligation "of the highest order" to prevent it. Based on my analysis of free exercise jurisprudence and the issues surrounding marital status discrimination, I cannot conclude that eradication of marital status discrimination in the rental housing industry constitutes a governmental interest of such high order as to justify burdening Swanner's fundamental constitutional rights.[2]

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[2] Significantly, the majority cites no cases to support the proposition that the state has a compelling interest in eradicating marital status discrimination, particularly when the discrimination at issue must be balanced against interests of constitutional magnitude. Both *Loomis Elec. Protection, Inc. v. Schaefer*, 549 P.2d 1341 (Alaska 1976), and *Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local*

There can be no question that the state has a compelling interest in eradicating discrimination against certain historically disadvantaged groups. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 593-95, 103 S.Ct. 2017, 2029-30, 76 L.Ed.2d 157 (1983) (racial discrimination); *Roberts v. United States Jaycees*, 468 U.S. 609, 625, 104 S.Ct. 3244, 3253-54, 82 L.Ed.2d 462 (1984) (gender discrimination). This compelling interest has been found to exist based on a determination that the discrimination at issue is so invidious to personal dignity and to our concept of fair treatment as to warrant strict protection. There is no question that Swanner's right to freely exercise his religion could and should be burdened if he engaged in such discrimination as a result of his religious beliefs.

This fact does not mean, however, that every form of discrimination is equally invidious or that the state's interest in preventing it necessarily outweighs fundamental constitutional rights. Rather, the cases which have upheld an imposition on free exercise have articulated certain specific reasons that some forms of discrimination are of particular governmental interest and deserving of heightened judicial scrutiny. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), for example, the Supreme Court refused to grant tax-exempt status to schools that maintained racially discriminatory policies under their interpretation of the Bible. In doing so, the Court discussed this nation's long history of

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879 v. Thomas, 551 P.2d 942 (Alaska 1976), cite the general purpose statement of AS 18.80.200; however, neither case does so to establish the existence of a compelling state interest. Both cases involved gender discrimination, the eradication of which has been held to be a compelling interest, as I discuss infra. Neither case is applicable to the instant case, where marital status discrimination is involved and where the discriminating party is asserting a core constitutional freedom.

officially sanctioned racial segregation and discrimination in education. It further noted that, since the late 1950s, every pronouncement of the Supreme Court and myriad Acts of Congress and Executive Orders attested to a national policy prohibiting such discrimination. Id. at 594-95, 604, 103 S.Ct. at 2029-30, 2035. It therefore concluded that "[t]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." Id. at 592, 103 S.Ct. at 2029. Accordingly, the government's interest in eradicating racial discrimination in education was found to be compelling.

Similarly, in *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the Supreme Court declared that the state's compelling interest in eradicating discrimination against its female citizens justified any minimal interference with an all-male organization's freedom of expressional association. In analyzing the weight of the state's interest, the Court discussed the invidious nature of gender bias, stating:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Id. at 625, 104 S.Ct. at 3253. (citations omitted). The Court also observed that society generally had recognized the importance of removing "the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." Id. at 626, 104 S.Ct. at 3254. Based on these conclusions, it was

no stretch to find that the state possessed a compelling interest in eradicating gender discrimination, and that this interest was sufficient to overcome the Jaycees' First Amendment claim. Id. at 626-29, 104 S.Ct. at 3254-56.

The majority today avoids engaging in any similar analysis of marital status discrimination to explain why or how it is so damaging to human dignity to become of such governmental import as to overcome a fundamental constitutional right.[3] This analysis is critical. The majority cites no evidence that marital status classifications have been associated with a history of unfair treatment that would warrant heightened governmental protection.[4] To the contrary, I believe the law is clear that

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[3] While the majority contends that its decision today affects only Swanner's conduct, not his religious beliefs, Opinion at 283, I do not believe that the Alaska Constitution distinguishes so clearly between religious belief and religious conduct. *See Frank*, 604 P.2d at 1070 (because of the close relationship between conduct and belief, and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they are outweighed by a compelling governmental interest). *See also Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535-36, 32 L.Ed.2d 15 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments."); *Smith*, 494 U.S. at 893, 110 S.Ct. at 1608 (O'Connor, J., concurring) ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause."). I would hold that conduct that is motivated by sincere religious belief is presumptively protected by Article I, section 4.

[4] The majority pronounces that "the government views acts of discrimination as independent social evils.. . ." Opinion at 283. This analysis ignores the specific issue here: discrimination in housing based on marital status. Had Swanner's religious beliefs compelled him to discriminate based on characteristics such as race or gender, I clearly would vote to deny an exemption. However, I am not convinced that marital status discrimination is or should be treated as comparable in any way to race or gender discrimination.

marital status classifications have been accorded relatively low import on the scale of interests deserving governmental protection. For instance, the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined. Alaska law explicitly sanctions such discrimination. *See*, e.g., AS 13.11.015 (intestate succession does not benefit unmarried partner of decedent); AS 23.30.215(a) (workers' compensation death benefits only for surviving spouse, child, parent, grandchild, or sibling); Alaska R.Evid. 505 (no marital communication privilege between unmarried couples); *Serradell v. Hartford Accident & Indemn. Co.*, 843 P.2d 639, 641 (Alaska 1992) (no insurance coverage for unmarried partner under family accident insurance policy).

In addition, marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause of either the federal or the Alaska Constitutions. Disparate treatment of individuals based on classifications such as race, on the other hand, are reviewed under the highest scrutiny. *See*, e.g., *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (restrictions curtailing the civil rights of a single racial group are immediately suspect and deserve strict scrutiny analysis). Gender-based classifications are similarly analyzed under a heightened level of scrutiny at the federal level. *See*, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150, 100 S.Ct. 1540, 1545, 64 L.Ed.2d 107 (1980) (gender-based discrimination must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives). The sliding scale approach to equal protection analysis under the Alaska Constitution similarly applies a heightened level of scrutiny to laws burdening racial minorities or other suspect classifications. *See State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) ("[L]aws which

embody classification schemes that are more constitutionally suspect, such as laws discriminating against racial or ethnic minorities, are more strictly scrutinized."); *State v. Erickson*, 574 P.2d 1, 11-12 (Alaska 1978) (where fundamental rights or suspect categories are involved, equal protection analysis under the Alaska Constitution requires a compelling state interest).

At the federal level, the eradication of marital status discrimination in the housing context clearly has not been treated as a compelling interest.[5] Neither the Federal Fair Housing Act, 42 U.S.C. § 3604 (1988), nor the Federal Civil Rights Act, 42 U.S.C. § § 1981 and 1982 (1988), would prohibit the precise form of marital status discrimination at issue here, unless it was being used as a pretext for a more egregious form of discrimination, such as that based on race. *See Marable v. H. Walker & Assocs.*, 644 F.2d 390, 397 (5th Cir.1981) (finding a violation of the fair housing and civil rights statutes only after concluding that, although the landlord asserted that he refused to rent housing based on the applicant's marital status, this excuse was a mere pretext for racial discrimination); *see* also James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair*

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[5] While I recognize that Alaska's antidiscrimination legislation is not substantially similar to comparable federal laws--see, *e.g., Hotel, Motel, Restaurant, Constr. Camp Employees and Bartenders Union Local 879 v. Thomas*, 551 P.2d 942, 945 (Alaska 1976)--the majority's failure to cite any authority for a compelling interest at the state level in this case leads me to make this comparison for further guidance.

My research has not revealed a single instance in which the government's interest in eliminating marital status discrimination has been accorded substantial weight when balanced against other state interests, let alone fundamental constitutional rights. I find nothing to suggest that marital status discrimination is so invidious as to outweigh the fundamental right to free exercise of religion.

Housing, 42 Vand.L.Rev. 1049, 1106 (1989) (the Fair Housing Act does not protect unmarried couples from a landlord's refusal to rent unless a case can be made that the marital status discrimination is merely a pretext for racial, ethnic, religious or gender-based discrimination).

The majority comments that its result today is justified because Swanner's right to the free exercise of his religious beliefs must be accorded less weight since he has entered the commercial arena. Opinion at 283-284. As discussed above, it is well-accepted that an individual's right to religious freedom will not and cannot always override other interests. *See*, e.g., *United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (rejecting Amish employer's claim that imposition of social security taxes violated his free exercise rights). However, neither Lee nor any other case of which I am aware stands for the proposition that individuals like Swanner altogether waive their constitutional right to the free exercise of religion simply because a conflict between their religious faith and some legislation occurs in a commercial context. To the contrary, the Lee Court recognized that, even in a commercial setting, the state must justify its limitation on religious liberty by showing the limitation is "essential to accomplish an overriding governmental interest." Id. at 257- 58, 102 S.Ct. at 1055. The AERC has simply failed to meet that burden here.

The majority suggests that Swanner's constitutional rights must be accorded lesser weight because he voluntarily engages in the property management industry, and his right to engage in that business is not entitled to judicial protection. Opinion at 283-284. However, this court has stated that "the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes." *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 632 (Alaska 1989) (citing *Commercial Fisheries Entry Comm'n v.*

Apokedak, 606 P.2d 1255, 1266 (Alaska 1980)). The ability to participate in a particular industry, such as rental property management, is therefore entitled to more protection under our state constitution than the majority acknowledges.

The majority incorrectly relies on *Seward Chapel* to arrive at its contrary conclusion. Unlike the present case, Seward Chapel did not involve a forced decision between giving up one's livelihood or violating one's religious beliefs. In *Seward Chapel*, we merely found that no religious belief required an exception to city zoning laws prohibiting the location of a parochial school on a specific site. 655 P.2d at 1302. No activity was totally prohibited; only the place in which it could be conducted was being regulated. I believe that there is a significant difference between the inconvenience placed upon Seward Chapel and the total abrogation of Mr. Swanner's right to earn a living in his chosen profession while abiding by his sincerely held religious beliefs.

There is no basis in the record to conclude that an exemption in this case would create a substantial threat of harm.

In *Frank*, this court required that the state establish precisely how its interest would suffer if an exemption was granted to accommodate the religious conduct at issue. 604 P.2d at 1073. Thus, even accepting that the government has a strong interest in assuring available housing, the AERC must show how this interest will suffer in real terms if an exemption is granted to Swanner.

I see no evidence whatsoever in the record to suggest that Swanner's conduct poses a substantial threat to public safety, peace or order such that the burden on Swanner's rights is justified. For this reason, I fail to see why an exemption to accommodate Swanner's religious beliefs is not warranted. Mere speculation that housing for unmarried couples may

become scarce if an exemption is granted is insufficient to establish a compelling governmental interest. In *Frank*, we specifically criticized the state for speculating, without any supporting data, that an exemption to moose hunting regulations for an Athabascan funeral potlatch would open the flood gates to widespread poaching. Id. at 1074. We stated: " 'Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment.' " Id. (quoting *Teterud v. Burns*, 522 F.2d 357, 361-62 (8th Cir.1975)). We further found that, since the state had not presented any evidence that so many moose would be taken for funeral potlatch ceremonies as to jeopardize appropriate population levels, it had not met its burden to justify curtailing the religious practice at issue. Id.[6]

As in *Frank*, the record here is completely devoid of any evidence to suggest that there are so many landlords or property managers in Anchorage whose religious beliefs are identical to Swanner's as to constitute a substantial threat to available housing. In a city the size of Anchorage, it is difficult to conclude based on intuition alone that housing availability for unmarried couples will become so scarce as to constitute a

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[6] Our requirement of evidentiary support for the state's refusal to grant an exemption is well-supported by United States Supreme Court precedent. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 719, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) (rejecting state's asserted reasons for refusing a religious exemption due to lack of evidence in the record); *Wisconsin v. Yoder*, 406 U.S. 205, 224-29, 92 S.Ct. 1526, 1537-40, 32 L.Ed.2d 15 (1972) (rejecting state's argument concerning the dangers of a religious exemption as speculative and unsupported by the record); *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) ("[T]here is no proof whatever to warrant such fears . . . as those which the [state] now advance[s]."); *see also Smith*, 494 U.S. at 911, 110 S.Ct. at 1618 (Blackmun, J., dissenting) (state's assertion that religious exemption for peyote use would harm health and safety of state citizens is unsupported and speculative).

substantial threat to community welfare. If there were some persuasive evidence to support such a conclusion, I may well have arrived at a different conclusion today.

CONCLUSION

I believe Swanner has been presented with a Hobson's choice of either complying with the law or abandoning the precepts of his religion. Since the government's interest in this particular law does not outweigh Swanner's fundamental religious rights, Swanner should be granted an exemption to accommodate his beliefs. The AERC relies on nothing more than a pure conclusion that the state has a compelling interest in preventing marital status discrimination in housing. It has not presented any evidence that an exemption in this case would result in a substantial threat to housing availability. Nor does it explain exactly what is so invidious about marital status discrimination as to make its proscription a governmental interest of the highest order, comparable with the state's interest in eradicating racial or gender discrimination. For these reasons, I fail to see how a limited exemption for Swanner and others similarly situated is not justified. In my opinion, the analysis and result set forth in this case will return to haunt this court in future decisions.

APPENDIX D

STATUTORY PROVISIONS

AS 18.80.240

Unlawful practices in the sale or rental of real property. It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale,l lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;

(4) to offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection

therewith because of a person's sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color national origin, or age;

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race religion, physical or mental disability, color national origin, age, sex, marital status, change in marital status, or pregnancy of that person or of any person associated with that person;

(6) to engage in blockbusting;

(7) to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of real property that indicates any preference, limitation, or discrimination based on race, color, religion, physical or mental disability, sex, or national origin, or an intention to make the preference, limitation, or discrimination.

AS 18.80.270

Penalty. A person, employer, labor organization, or employment agency, who or that wilfully engages in an unlawful discriminatory conduct prohibited by this chapter, or wilfully resists, prevents, impedes, or interferes with the commission or any of its authorized representatives in the performance of duty under this chapter, or who or that wilfully violates an order of the commission, is guilty of a misdemeanor and upon conviction by a court of competent jurisdiction is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than 30 days, or by both.

AMC 5.20.020

Unlawful practices in sale or rental of real property.

Except in the individual home wherein the renter or lessee would share common living areas with the owner, lessor, manager, agent or other person, it is unlawful for the owner, lessor, manager, agent or other person having the right to sell, lease, rent or advertise real property to:

A. Refuse to sell, lease or rent the real property to a person because of race, religion, age, sex, color, national origin, marital status or physical or mental disability.

B. Discriminate against a person because of race, religion, age, sex, color, national origin, marital status or physical or mental disability in a term, condition or privilege relating to the use, sale, lease or rental of real property.

C. Make a written or oral inquiry or record of the race, religion, age, sex, color, national origin, marital status or physical or mental disability of a person seeking to buy, lease or rent real property.

D. Offer, solicit, accept, use or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or sources in connection therewith because of a person's race, religion, age, sex, color, national origin, marital status or physical or mental disability.

E. Represent to a person that real property is not available for inspection, sale, rental or lease when in fact it is available, or refuse a person the right to inspect real property, because of the race, religion,

age, sex, color, national origin, marital status or physical or mental disability of that person or because of any person associated with that person.

F. Engage in blockbusting.

G. Circulate, issue or display, make, print or publish, or cause to be made or displayed, printed or published, any communication, sign, notice, statement or advertisement with respect to the use, sale, lease or rental of real property that indicates any preference, limitation, specification or discrimination based on race, religion, age, sex, color, national origin, marital status or physical or mental disability. this shall not be construed to apply to publishing companies which accept advertising in the ordinary course of business.

APPENDIX E

Excerpts from Alaska Administrative Code

6 AAC 30.990 Definitions.

(d) For purposes of AS.18.80.240, the terms "lease" or "rental" of real property does not apply to the payment of rent for a room in a dwelling unit when the lessor and lessee will be sharing common living areas in the dwelling unit and the lessor actually occupies the dwelling unit as a resident.